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v.
United States

Docketed:
February 12, 1997

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Rubinstein,Javier H.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Feb 12 1997	G	Petition for writ of certiorari filed. (Response due April 29, 1997)
3	Mar 7 1997		Order extending time to file response to petition until April 14, 1997.
4	Apr 14 1997		Order further extending time to file response to petition until April 29, 1997.
5	Apr 23 1997		Brief of respondent United States in opposition filed.
6	May 6 1997		DISTRIBUTED. May 22, 1997 (Page 1)
7	May 7 1997	X	Reply brief of petitioner George Rogers filed.
8	May 14 1997	X	Supplemental brief of petitioner filed.
9	May 27 1997		Petition GRANTED. limited to the following question: "Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." SET FOR ARGUMENT November 5, 1997. **********
11	Jun 27 1997		Order extending time to file brief of petitioner on the merits until July 27, 1997.
12	Jul 10 1997		Joint appendix filed.
15	Jul 25 1997		Brief of petitioner George G. Rogers filed.
14	Jul 31 1997		Order extending time to file brief of respondent on the merits until September 12, 1997.
16	Sep 12 1997		Brief of respondent United States filed.
17	Sep 16 1997		CIRCULATED.
18	Oct 14 1997	X	Reply brief of petitioner George G. Rogers filed.
19	Oct 24 1997		Record filed.
		*	Original record proceedings U. S. District Court for the Southern District of Florida (BOX) (1 SEALED ENVELOPE).
20	Nov 5 1997		ARGUED.
21	Nov 6 1997	G	Motion of petitioner for leave to file a supplemental brief after argument filed.
22	Nov 6 1997		DISTRIBUTED. November 7, 1997 (Page 20)
23	Nov 10 1997		Motion of petitioner for leave to file a supplemental brief after argument GRANTED.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

60 pp

QUESTION PRESENTED

Petitioner was convicted of possession of an unregistered and unserialized silencer in violation of the National Firearms Act, 18 U.S.C. §§ 5861(d), (i), 5871. The trial court, over defense counsel's timely objection, refused to instruct the jury that the government, as an element of the offenses charged, was required to prove that petitioner knew the item in question was a "firearm" within the meaning of the statute. On appeal, the government conceded that the district court's instructions erroneously omitted an essential element of the offenses charged under *Staples* v. *United States*, 511 U.S. 600 (1994), but argued nonetheless that the error was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam). The Eleventh Circuit agreed, holding the error was "harmless" because the court was "certain that the verdict in this case would have been the same" had the jury been instructed on the omitted element.

The question presented is:

Whether the Eleventh Circuit correctly held, in conflict with decisions of the First, Fourth, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits, and those of 18 state courts of last resort, that a trial court's complete failure to instruct the jury on an essential element of a criminal offense can be "harmless" under Article III and the Fifth and Sixth Amendments to the United States Constitution even where the jury has made no findings concerning the omitted element.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

I. THE COURT OF APPEALS' HOLDING THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS CONFLICTS WITH DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS. 10

II. THE COURT OF APPEALS WRONGLY HELD THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS EVEN WHERE THE JURY HAS FAILED TO FIND FACTS ESTABLISHING THE MISSING ELEMENT BEYOND A REASONABLE DOUBT. 17

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 7, 8

Bollenbach v. *United States*, 326 U.S. 607 (1946) 19

California v. *Roy*, 117 S. Ct. 337 (1996) . . . . . *passim*

Carella v. *California*, 491 U.S. 263 (1989) . . . . . *passim*

Carpenter v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989) 12

Chapman v. *California*, 386 U.S. 18 (1967) 2, 11, 13

Commonwealth v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988) 13

Commonwealth v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987) 12

Connecticut v. *Johnson*, 460 U.S. 73 (1983) . . . 17, 23, 24

Dawson v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995) 12

Hennessy v. *Goldsmith*, 929 F.2d 511 (9th Cir. 1991) 3, 15, 16

Hereford v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993) 12

Page

Hoover v. *Garfield Heights Mun. Ct.*, 802 F.2d 168 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987) 3, 13, 15

Hunter v. *State*, 1996 WL 352829 (Miss. June 27, 1996) 12

Ianniello v. *United States*, 10 F.3d 59 (2d Cir. 1993) 11, 12

In re Winship, 397 U.S. 358 (1970) 19

Jones v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996) 12

Lomas v. *State*, 639 P.2d 551 (Nev. 1982) 12

McKinney v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990) 12

Monk v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993) 12

Mouton v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995) 12

Old Chief v. United States, 1997 WL 3230 (Jan. 7, 1997) 21, 22

People v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992) 12

People v. *Kobrin*, 903 P.2d 1027 (Cal. 1995) 12

People v. *Mattas*, 645 P.2d 254 (Colo. 1982) 12

Page

People v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994) 12

People v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994) 12

Robinson v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996) 12

Rose v. *Clark*, 478 U.S. 570 (1986) 24

Roy v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub. nom. *California* v. *Roy*, 117 S. Ct. 337 (1996) 3, 9, 20

Slusher v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991) 12

Smoot v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994) 12

Sparf v. *United States*, 156 U.S. 51 (1895) 20

Staples v. *United States*, 511 U.S. 600 (1994) 6, 7, 10

State v. *Aumick*, 894 P.2d 1325 (Wash. 1995) 12

State v. *Avila*, 710 P.2d 440 (Ariz. 1985) 12

State v. *Barr*, 237 N.W.2d 888 (S.D. 1976) 12

State v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990) 12

State v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994) . . . 12

State v. *Bryant*, 670 A.2d 776 (R.I. 1996) 12

Page

State v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985) 12

State v. *Federico*, 510 A.2d 1147 (N.J. 1986) 12

State v. *Forsyth*, 642 P.2d 1035 (Mont. 1982) 12

State v. *Gibson*, 908 P.2d 352 (Utah 1995) 12

State v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994) 12

State v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995) 12

State v. *Lopez*, 920 P.2d 1017 (N.M. 1996) 12

State v. *Miller*, 400 S.E.2d 611 (W. Va. 1990) 12

State v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990) . . 13

State v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982) 13

State v. *Myers*, 510 N.W.2d 58 (Neb. 1994) 12

State v. *Nason*, 433 A.2d 424 (Me. 1981) 12

State v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995) 12

State v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990) 12

State v. *Watson*, 885 P.2d 1226 (Kan. 1994) 12

Page

State v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991) 12

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

Teel v. *Tennessee*, 498 U.S. 1007 (1990) 3, 14

United Bhd. of Carpenters v. *United States Bay Counties Dist. Council*, 330 U.S. 395 (1947) . . 19, 20

United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996) . . . 13

United States v. *Gaudin*, 115 S. Ct. 2310 (1995) 19

United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) . . 13

United States v. *Johnson*, 82 F.3d 429 (11th Cir. 1996), cert. granted, 117 S. Ct. 451 (Nov. 15, 1996) (No. 96-203) 16

United States v. *Laughlin*, 26 F.3d 1523 (10th Cir.), cert. denied, 115 S. Ct. 428 (1994) 14

United States v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996) 15

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 20

United States v. *Mentz*, 840 F.2d 315 (6th Cir. 1988) . . . 9

United States v. *Nguyen*, 73 F.3d 887 (9th Cir. 1995) . . 14

United States v. *Olano*, 507 U.S. 725 (1993) 16

Page

United States v. *Parmelee*, 42 F.3d 387 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995) . . . . . *passim*

United States v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996) 3, 8, 13

United States v. *Raether*, 82 F.3d 192 (8th Cir. 1996) 8, 11, 12

United States v. *Rogers*, 9 F.3d 1025 (2d Cir. 1993) . . . 11

United States v. *Wiles*, 1996 WL 707539 (10th Cir. Dec. 10, 1996) (en banc) 14, 15

United States v. *Winstead*, 74 F.3d 1313 (D.C. Cir. 1996) 14

Vigil v. *State*, 859 P.2d 659 (Wyo. 1993) 12

Waldemer v. *United States*, 98 F.3d 306 (7th Cir. 1996) 13

Walls v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989) 12

Constitutional Provisions

U.S. CONST. ART. III, § 2 2

U.S. CONST. AMEND. V 2

U.S. CONST. AMEND. VI 2

Page

Statutes

18 U.S.C. § 922(o) 5

18 U.S.C. § 5861(d) 5, 7

18 U.S.C. § 5861(i) 5

18 U.S.C. § 5871 i

Miscellaneous

Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995) . . 19, 25

J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819 (1994) 4

Brief for the United States in Opposition, *Masotto* v. *United States* (No. 95-1794) 11, 18

Brief for the United States in Opposition, *United States* v. *Edmonds* (No. 96-25) 18

Brief for the United States in Opposition, *United States* v. *Johnson* (No. 96-203) 16

Brief for the United States in Opposition, *United States* v. *Parmelee* (Nos. 94-1933 and 94-9078) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. _____

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

George G. Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-17a) is reported at 94 F.3d 1519. The judgment of the district court (App., *infra*, 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996, and a timely suggestion of rehearing *en banc* was denied on January 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT

This case presents for review the important and unanswered question of whether a trial court's failure to instruct the jury as to an essential element of the offense charged, and the jury's resultant failure to make any findings concerning that element, can ever be "harmless" under this Court's decisions in *Chapman* v. *California*, 386 U.S. 18 (1967), and *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993), given the defendant's constitutional right to a jury determination of guilt as to each element of the offense charged. The court of appeals, contrary to decisions of the First, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits, and those of eighteen state courts of last resort, held that the instructional omission below was "harmless" notwithstanding the jury's failure to find the predicate facts necessary to establish the omitted element beyond a reasonable doubt. The court did so based upon its certainty "that the verdict in this case would have been the same" had the jury been instructed on the omitted element. In so holding, the

court of appeals followed similar rulings by the Second and Eighth Circuits, and those of nine state courts of last resort.

The Eleventh Circuit's decision openly recognized that "[n]either we nor the Supreme Court has ever definitively ascertained the consequences that should follow from an instructional omission, and our sister circuits are divided on the issue." App., *infra*, 10a. As the court explained, "[s]ome circuits have determined that an instructional omission mandates reversal regardless of the circumstances." *Ibid.* (citing *United States* v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d 168 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987)). In contrast, "[o]ther circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny." *Ibid.* (citing *Roy* v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub. nom. *California* v. *Roy*, 117 S. Ct. 337 (1996); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995)).

Like other circuits before it, the court of appeals openly acknowledged the need for guidance from this Court to resolve the pervasive and long-standing disagreement among the state and federal courts on this important issue. As the court put it:

> We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority in our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful.

App., *infra*, 11a n.11, citing *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991); *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., joined by Marshall, J., dissenting from denial of certiorari). See also *United States* v. *Parmelee*, 42

F.3d 387, 392 & n.7 (7th Cir. 1994) ("the Supreme Court has yet to decide the question whether instructional error of this sort can ever be harmless. * * * a conflict of authority exists concerning the availability of harmless-error analysis in this situation. * * * The depth of this conflict underscores the importance of the question. Both considerations counsel for a grant of certiorari"), cert. denied, 116 S. Ct. 63 (1995); J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819, 844 (1994) (noting that the current state of the law "has fostered predictable confusion in the lower courts"). This Court should grant the petition to resolve the irreconcilable conflict on this important and recurring question of law.

1. On the evening of March 15, 1991, petitioner George Rogers was driving his pickup truck and was pulled over by a Broward County Deputy Sheriff who suspected him of driving while intoxicated. After taking a field sobriety test, petitioner was arrested for driving while intoxicated. R4:118-19.[1] In the course of a post-arrest search of petitioner and his truck, a .22-caliber handgun and magazine of .380 caliber ammunition were found in petitioner's pocket. The officer also found a .380 caliber handgun and ammunition in the front seat of petitioner's truck. Behind the driver's side of the bench seat of the truck, the officer found a closed black bag containing a MAC-11 pistol, an unserialized silencer and other items. R4:123-24. The bag was not visible from the driver's seat. R4:163.

During a post-arrest interview conducted a few hours later at approximately 3:00 a.m., petitioner admitted possessing the

[1] Petitioner was tried in a state court on the offenses for which he was arrested, including driving while intoxicated and carrying a concealed weapon. He was acquitted by the jury of all charges. R4:163.

.22 and .380 caliber handguns and ammunition. R4:184. He firmly denied, however, ever possessing any of the items in the black bag located behind the driver's seat, including the MAC-11 pistol and the silencer. R4:199-201. Petitioner nonetheless was shown the items from the black bag during the interview and asked by ATF agents: "do you know what these are?" Petitioner stated that he could identify what they were, including the silencer, based upon his training in the Special Forces during his military service in Viet Nam. He "vehemently denied," however, ever possessing those items, including the silencer, or knowing of their existence prior to his post-arrest interview. App., *infra*, 3a. A search of the National Firearms Registration and Transfer Record revealed no firearms registered to petitioner. *Id.* at 2a.

2. Petitioner was charged with possession of an unregistered silencer in violation of 18 U.S.C. § 5861(d), and possession of an unserialized silencer in violation of 18 U.S.C. § 5861(i).[2] The district court instructed the jury that for each offense the government had to prove petitioner "knowingly possessed" the firearm in question. However, the court also instructed the jury that it was *not* required to find petitioner was aware of characteristics of the items that rendered them registerable "firearms" under the statute:

[2] Petitioner also was charged with possession of an unregistered automatic machinegun (the MAC-11 pistol) in violation of 18 U.S.C. § 922(o). However, at trial the government offered no evidence that petitioner was aware the pistol had been converted to an automatic weapon. On appeal, the government conceded that, under *Staples*, petitioner's conviction for possession of the pistol should be vacated because "the government did not submit sufficient proof to the jury that appellant knew the MAC-11 had been converted from semi-automatic to fully-automatic status." U.S. C.A. Br. 5. The court of appeals agreed, holding that under *Staples* the "conviction on this count cannot stand." App., *infra*, 8a.

> It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered. * * * What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that [i]t was not then registered in the National Firearms Registration and Transfer Record.

App., *infra*, 6a. Petitioner timely objected to this instruction, arguing that the prosecution could only establish the offenses charged if it proved beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the statute. *Ibid.* Petitioner's objection was overruled, and the jury later convicted petitioner of each count. The court noted on the record, however, that "this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously was a close question for them because I think they felt he, I don't know if it was because of his war record or what happened in the war, or because of his unequivocal answers, but they did feel that compassion." R4:411. The district court sentenced petitioner to time served and three years supervised release, due in part to its finding that petitioner was "concerned about his conviction and his loss of civil rights. That speaks worlds for you, sir." 6/2/94 Tr. at 18.

3. On May 23, 1994, six weeks after the jury verdict, this Court announced its decision in *Staples* v. *United States*, 511 U.S. 600, 609 (1994), holding that the government must prove, as an essential element of the firearms offenses with which petitioner was charged, that the defendant knew "the particular characteristics that make his weapon a statutory

firearm." On the basis of *Staples*, petitioner appealed to the Eleventh Circuit, arguing that the district court reversibly erred in withdrawing from the jury an essential element of the offenses charged. On appeal, the government conceded that the court's instruction on the silencer charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. It argued nonetheless that the instructional omission was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), because "the evidence that appellant knew the nature of the silencer was unchallenged and unassailable." U.S. C.A. Br. at 10-11, 13.

The Eleventh Circuit affirmed. In doing so, it readily acknowledged that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." App., *infra*, 8a. The court also recognized that "the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime charged. Our quite daunting task is to determine the effect of that error." *Id.* at 10a.

The Eleventh Circuit addressed the question of harmless error by noting that the failure to instruct the jury on an essential element of the offense charged is not a "structural defect" under *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991):

> "We would be hard pressed to conclude that incomplete jury instructions exemplify a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless error' standards." Instead, we liken the error before us to

> other "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'"

App., *infra*, 12a (quoting *Fulminante*, 499 U.S. at 279; *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)).

The Eleventh Circuit distinguished the instructional omission below from the defective reasonable doubt instruction which this Court held in *Sullivan* was not subject to harmless error review, and rejected the Fifth Circuit's holding in *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (1996), that such omissions necessarily require reversal under *Sullivan*. As the court of appeals explained:

> We realize that at least one Court has relied upon *Sullivan* to foreclose the possibility of harmless error review where there has been an instructional omission. See *Pettigrew*, 77 F.3d at 1511. With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, *the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one*. Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

App., *infra*, 12a n.12 (emphasis added) (citing *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996)).

In reaching its decision, the court of appeals "wholeheartedly accept[ed]" the notion "that it cannot be harmless

when the trial court directs a verdict on an element of the crime charged." App., *infra* 15a. However, it disagreed with the Sixth Circuit's holding in *United States* v. *Mentz*, 840 F.2d 315, 324 n.17 (6th Cir. 1988), that an instructional omission on an essential element is tantamount to a directed verdict in favor of the prosecution: "We do not * * * equate an instructional omission with a directed verdict. In contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." App., *infra*, 12a n.13, citing *Roy* v. *Gomez*, 81 F.3d 863 (9th Cir.) (en banc), vacated sub nom. *California* v. *Roy*, 117 S. Ct. 337 (1996).

The Eleventh Circuit held Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263, 270 (1989) (per curiam), "to be applicable when adjudicating the effect of instructional omissions." App., *infra*, 14a, citing *Roy*, *supra*; *United States* v. *Parmelee*, 42 F.3d 387 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995). Applying that opinion, the Eleventh Circuit ruled that:

> an instructional omission * * * may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

App., *infra*, 14a. The court of appeals did *not* find that the first or third exceptions applied. Rather, the Eleventh Circuit concluded that the district court's failure to instruct the jury on

the element of *mens rea* under *Staples* was harmless under the second exception, because it believed petitioner had in effect "admitted" *mens rea* by identifying the silencer during his post-arrest interview:

> In his postarrest interview * * * Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. In fact, Rogers is a self-described student of silencers who had purchased at least one book on the subject. Moreover, Rogers's attorney during closing argument reiterated and attempted to downplay the defendant's concession on this point. These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any event admitted. * * * We have absolutely no difficulty in concluding that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction.

App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDING THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS CONFLICTS WITH DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS.

The court of appeals' decision in this case raises the fundamental question of whether a trial court's failure to instruct the jury on an essential element of a criminal offense can ever be "harmless" under the Constitution where the jury has made no findings concerning the omitted element. On this

recurring issue, federal and state courts are hopelessly deadlocked and have openly called for Supreme Court review.

A. As the Eleventh Circuit acknowledged, the circuits are deeply divided over whether harmless error analysis can be applied to the complete failure by a trial court, over timely objection, to instruct the jury on an essential element of the charged offense. Even the Solicitor General recently conceded the circuit split in cases where "the trial court failed completely to instruct the jury on one or more elements of an offense." Brief for the United States in Opposition, *Masotto* v. *United States*, No. 95-1794, at 13.

The Eleventh Circuit's decision follows similar rulings by the Second and Eighth Circuits holding that complete instructional omissions are subject to harmless error review under *Chapman*. In *Ianniello* v. *United States*, 10 F.3d 59 (2d Cir. 1993), the court applied harmless error review to a failure to instruct the jury on an essential element on the ground that "[h]armless error analysis is the rule rather than the exception, and courts may constitutionally play a guarded role in judging whether facts found by a jury are so conclusive on an ultimate factual issue — *an issue undecided by the jury because of a faulty charge* — that the error in the charge and resultant absence of an actual jury finding on the ultimate issue are harmless." *Id.* at 64 (emphasis added).[3] The court also cited the jury's findings of guilt on other elements as "overwhelming evidence" that the jury would have found the omitted element as well, and deduced that "'no rational juror' could conclude otherwise." *Id.* at 64, 65. In *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996), the court similarly held that

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[3] But see *United States* v. *Rogers*, 9 F.3d 1025, 1033 (2d Cir. 1993) (concluding that removal of essential element from jury's province was a "structural error" mandating reversal), cert. denied, 115 S. Ct. 95 (1994).

instructional omissions "are trial errors subject to harmless error review," as have the courts of last resort of nine states.[4]

Ianniello, *Raether* and the decision below, however, irreconcilably conflict with decisions of the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, and those of the highest courts of eighteen states.[5]

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[4] See, *e.g.*, *State* v. *Avila*, 710 P.2d 440 (Ariz. 1985); *State* v. *Watson*, 885 P.2d 1226 (Kan. 1994); *State* v. *Nason*, 433 A.2d 424 (Me. 1981); *People* v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994); *State* v. *Lopez*, 920 P.2d 1017 (N.M. 1996); *State* v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994); *State* v. *Barr*, 237 N.W.2d 888 (S.D. 1976); *State* v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990); *State* v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991). See also *State* v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985); *People* v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994); *State* v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995); *Mouton* v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995); *Smoot* v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994).

[5] See, *e.g.*, *People* v. *Kobrin*, 903 P.2d 1027 (Cal. 1995); *People* v. *Mattas*, 645 P.2d 254 (Colo. 1982); *Walls* v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989); *Carpenter* v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989); *Commonwealth* v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987); *State* v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990); *Hunter* v. *State*, 1996 WL 352829 (Miss. June 27, 1996); *State* v. *Forsyth*, 642 P.2d 1035 (Mont. 1982); *State* v. *Myers*, 510 N.W.2d 58 (Neb. 1994); *Lomas* v. *State*, 639 P.2d 551 (Nev. 1982); *State* v. *Federico*, 510 A.2d 1147 (N.J. 1986); *People* v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992); *Slusher* v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991); *State* v. *Bryant*, 670 A.2d 776 (R.I. 1996); *State* v. *Gibson*, 908 P.2d 352 (Utah 1995); *State* v. *Aumick*, 894 P.2d 1325 (Wash. 1995); *State* v. *Miller*, 400 S.E.2d 611 (W. Va. 1990); *Vigil* v. *State*, 859 P.2d 659 (Wyo. 1993). See also *Hereford* v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993); *Dawson* v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995); *State* v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994); *Jones* v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996); *Robinson* v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996); *McKinney* v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990); *Monk* v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993); *State* v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995);

For example, in *United States* v. *DiRico*, 78 F.3d 732 (1st Cir. 1996), the First Circuit held that a trial court's failure to submit to the jury an essential element of the crime charged is a "structural defect" requiring reversal. As the court explained, "where a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged," harmless error analysis has no application because a reviewing court "cannot conclude on appeal that the government proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' since a verdict of guilt as to every essential element was never obtained." *Id.* at 737-38.

DiRico is consistent with decisions of seven other circuits that also have held that instructional omissions are not amenable to harmless error review under *Chapman*. In *United States* v. *Johnson*, 71 F.3d 139, 144 (4th Cir. 1995), for example, the court held that a complete instructional omission precluded harmless error review because there was no independent finding by the jury on the omitted element. To find harmless error, the court held, would have required it to "engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*." *Ibid.* See also, *e.g.*, *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (under *Sullivan*, omission of an essential element automatically requires reversal because the "the jury rendered no verdict as to that particular element of the offense"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* harmless error analysis does not apply"); *Waldemer* v. *United States*, 98

State v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990); *Commonwealth* v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988); *State* v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982).

F.3d 306, 309 (7th Cir. 1996) ("if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless");[6] *United States* v. *Nguyen*, 73 F.3d 887, 895 (9th Cir. 1995) (where "the jury was precluded from considering whether an essential element existed," and there was no independent jury determination regarding the omitted element, reversal is required); *United States* v. *Laughlin*, 26 F.3d 1523, 1527 (10th Cir.) ("[f]ailure to instruct on such an essential element as intent or knowledge requires reversal because the 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"), cert. denied, 115 S. Ct. 428 (1994); *United States* v. *Wiles*, 1996 WL 707539, at *13 (10th Cir. Dec. 10, 1996) (en banc) ("the district court's failure to instruct the respective juries on [an essential element] is structural and requires us to vacate [the] convictions"); *United States* v. *Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (complete failure to present an essential element of the crime charged to the jury presents "a truly compelling claim for reversal").

The conflict over whether instructional omissions are subject to harmless error review is undeniable, and has been widely recognized. See, *e.g.*, *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari) (noting that "a conflict of authority exists concerning the availability of harmless-error analysis" when a jury is not

[6] But see *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (stating that "in light of *Sullivan*," the district court's failure to instruct jury on essential element of crime charged "is amenable to harmless-error review," but concluding that the jury's verdict necessarily included a finding beyond a reasonable doubt as to the omitted element), cert. denied, 116 S. Ct. 63 (1995).

instructed on an essential element of the crime charged); *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d 168, 176-77 (6th Cir. 1986) (noting the split in authority and stating that "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless"); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (same), cert. denied, 116 S. Ct. 63 (1995); *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991) (noting that "[t]he law in this area is an unfinished symphony," and that "[a]dditional guidance and clarification would be helpful"); App., *infra*, 10a n.11 (same). See also *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), cert. denied, 116 S. Ct. 2529 (1996) (noting similar uncertainty and that its "best guess is that the Supreme Court would regard an omitted element reversible error per se if there were a timely objection").

In large part, this circuit split derives from a fundamental disagreement as to the nature and constitutional significance of an instructional omission on an essential element. Some circuits, like the First, Sixth and Tenth, hold that a complete instructional omission is tantamount to a directed verdict by the trial court on the omitted element, and therefore cannot be harmless. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d at 960; *Hoover* v. *Garfield Heights Mun. Ct.*, 802 F.2d at 177 ("when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless"); *United States* v. *Wiles*, 1996 WL 707539, at *15 (10th Cir. Dec. 10, 1996) (en banc) ("To conclude the error was harmless or not plain would be the same as directing a verdict on the element—both would prevent an actual jury verdict on that element"). Other courts, like the court of appeals below, have expressly rejected this view, refusing to "equate an instructional omission with a directed verdict" on the ground that "failure to instruct on a

particular element does not completely prohibit the jury from considering evidence relevant to that issue." App., *infra* 15a n.13. See also *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991) (refusing to equate failure to instruct the jury on an essential element with a directed verdict on that element).[7]

B. The prejudice to petitioner and others similarly situated resulting from this split of authority is readily apparent. Had petitioner resided in any of the eight circuits that refuse to apply harmless error analysis to elemental omissions, his criminal conviction would now have been reversed, entitling him to a new trial before a properly instructed jury.

The extent to which harmless error review can be applied to instruction omissions also is a recurring issue that will

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[7] This Court recently granted certiorari in *United States* v. *Johnson*, 82 F.3d 429 (11th Cir. 1996), cert. granted, 117 S. Ct. 451 (Nov. 15, 1996) (No. 96-203). *Johnson*, however, will not resolve the circuit split on the question presented. In *Johnson*, the trial court found the omitted element rather than submit it to the jury, and thus did not involve an instructional omission, but rather an explicit directed verdict by the court on the element in question—an error this Court never has held to be "harmless." Because *Johnson* does not involve a true instructional omission, it cannot resolve the conflict over whether such an omission is tantamount to a directed verdict, or is amenable to harmless error review. Moreover, the petitioner in *Johnson* did not object to the error at trial, and thus the issues there are governed by the plain error standard of Fed. R. Crim. P. 52(b). See Brief for the United States, *United States* v. *Johnson* (No. 96-203), at 11, 13 (arguing "'that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it,'" and that "the more lenient 'harmless error' standards of Rule 52(a) * * * [are] unavailable because, as this Court has observed, that provision governs 'nonforfeited errors'") (quoting *United States* v. *Olano*, 507 U.S. 725, 731 (1993)). In contrast, the question presented here, where a contemporaneous objection was made, is purely a constitutional one that will apply to federal and state courts alike.

continue to confront the state and federal courts in virtually all cases where essential elements have been omitted from the jury's consideration. Given the sheer volume of recent cases decided by the state and federal courts of appeals that have addressed this important issue, without any consensus, there is no reason at all to believe that the lower courts will be able to resolve their disagreement without Supreme Court guidance.

Review by this Court is warranted to resolve this conflict among the federal circuits and state courts of last resort and to bring needed clarity to this important area of the law.

II. THE COURT OF APPEALS WRONGLY HELD THAT FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CAN CONSTITUTIONALLY BE HARMLESS EVEN WHERE THE JURY HAS FAILED TO FIND FACTS ESTABLISHING THE MISSING ELEMENT BEYOND A REASONABLE DOUBT.

It is undisputed that the district court in this case failed to instruct the jury on an essential element of the offenses with which petitioner was charged, *i.e.*, his knowledge that the items he allegedly possessed were "firearms" within the meaning of the National Firearms Act. It is also uncontested that the jury never made findings concerning this omitted element.[8] The

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[8] This case does not involve one of those "rare situations" where what the jury found can fairly be said to encompass what it was told not to find. *Carella*, 491 U.S. at 270 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)). The trial court expressly instructed the jury that the government was *not* required to prove petitioner's knowledge that he possessed an item bearing the characteristics of a "firearm" under the Act (*i.e.* his knowledge that what he possessed was an operational silencer). As the government conceded below, the court "explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. The Eleventh Circuit also explicitly found that none of the jury's findings, alone or in combination, logically required it to find that petitioner knew he

court of appeals nevertheless affirmed petitioner's convictions, holding that the district court's constitutional error was harmless because the jury "made a constitutionally valid determination of guilt on all issues save one." App., *infra*, 13a n.12. The court also noted its "certain[ty] that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.

The court of appeals' use of "harmless error" review in this case to supply a finding that the jury never made cannot be reconciled with this Court's decisions that consistently have safeguarded the defendant's right to a jury determination on *all*

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possessed an operational silencer. App., *infra*, 14a-15a (declining to find that this case was one "[w]here the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element").

Accordingly, this case is unlike those in which the Court has denied certiorari where the essential element in dispute, while not separately listed by the trial court, was actually found by the jury. In *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994), cert. denied, 116 S. Ct. 63 (1995) (Nos. 94-1933 and 94-9078), for instance, the Solicitor General opposed certiorari on the ground that "while the court's listing of the elements did not expressly refer to" the element in question, the jury instructions, taken as a whole, "required a finding" by the jury of the element. Brief for the United States in Opposition, at 8. Similarly, in *United States* v. *Edmonds*, 80 F.3d 810 (3d Cir.), cert. denied, 117 S. Ct. 295 (1996) (No. 96-25), where petitioner complained that harmless error analysis was erroneously applied to the trial court's failure to instruct the jury on an essential element, (see Brief for the Petitioner, at 6-9), the Solicitor General countered that the instructions required "the jury [to make] the functional equivalent of . . . a finding" on the omitted element. Brief for the United States in Opposition, at 8. See also Brief for the United States in Opposition, *Masotto* v. *United States*, No. 95-1794, at 12 (opposing certiorari on the ground that the court of appeals "could conclusively determine from the record of the case that the jury, despite the instructional error, actually found that petitioner was a leader of the RICO enterprise"). In short, the principal factor counseling against certiorari in these cases is not present here.

essential elements of the offense charged. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Under *Sullivan*, failure to instruct the jury on an essential element of an offense, and the jury's resultant failure to determine whether that element was established beyond a reasonable doubt, cannot constitutionally be "harmless" regardless of an appellate court's "certainty" of guilt.

A criminal defendant's constitutional right to a trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. Accord *United Bhd. of Carpenters* v. *United States Bay Counties Dist. Council*, 330 U.S. 395, 409-10 (1947) ("guilt is determined by the jury, not the court"). As Justice Frankfurter explained 50 years ago in *Bollenbach* v. *United States*, 326 U.S. 607 (1946):

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Id. at 615. See also Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1191 (1995).

The constitutional right to a jury determination of guilt "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995). Accord *In re Winship*, 397 U.S. 358, 364 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with he is charged"). This is a right that cannot be made to depend upon a court's perception of the defendant's guilt.[9] A court "may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. Accord, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (the jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction") (citing *Carpenters*, 330 U.S. at 408; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895)).

The Eleventh Circuit's decision in this case cannot be reconciled with these precedents. The court of appeals readily acknowledged that "the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime." App., *infra*, 10a. The court nevertheless upheld petitioner's silencer possession conviction of an unregistered silencer by holding that the district court's instructional omission was "harmless." Citing

[9] Of course, if the instructional omission does not prevent the reviewing court from concluding, beyond a reasonable doubt, "that the jury actually made the finding that inheres in the [omitted] element," then harmless error review may be applied. See *Roy*, 117 S. Ct. at 339-40 (Scalia, J., joined by Ginsburg, J., concurring) (citing *Carella*, 491 U.S. at 271 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring in the judgment)). But, as noted *supra* at 18 n.9, the instructions in this case did not require the jury to make any finding on the omitted element, and instead *removed* that element from the jury's consideration. Thus, as this Court held in *Sullivan*, 508 U.S. at 280, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate."

petitioner's statements during a post-arrest police interrogation as to his general familiarity with silencers due to his military service, the court of appeals concluded that petitioner "emphatically and without reservation admitted that he knew the item found in his truck was a silencer." App., *infra*, 16a. It thus found the trial court's instructional omission of that element harmless because it was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.[10]

Regardless of whether it properly "weighed" the evidence, the court of appeals reversibly erred by engaging in harmless error review. Harmless error analysis has no application in cases like this where the jury never made a constitutionally valid determination of guilt on each essential element of the offense charged. Where "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent." *Sullivan*, 508 U.S. at 280.

The court of appeals, however, held that *Sullivan* was inapplicable to this case since the district court's instructional omission involved "only one element" of the offenses charged:

[10] Even if petitioner had "admitted" the element omitted in this case (which he did not), the government still would not be relieved of its burden to establish that element beyond a reasonable doubt, nor would it have diminished petitioner's right to a jury determination of guilt on that element. As Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, recently explained in her dissent in *Old Chief v. United States*, 1997 WL 3230 (Jan. 7, 1997), "a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element. It follows from these principles that a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Id.* at *15-*16.

> the jury [made] a constitutionally valid determination of guilt on all issues save one. . . . Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

App., *infra*, 12a n.12.

The notion that a criminal conviction can be upheld as long as the jury "only" fails to find "one element" of the offense represents an untenable erosion of the guarantees of Article III and the Fifth and Sixth Amendments. This Court in *Gaudin* explicitly reaffirmed "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence *on every issue*." 115 S. Ct. at 2315 (emphasis added). As Justice Scalia recently explained in his concurring opinion in *California* v. *Roy*, 117 S. Ct. 337 (1996), a case where the trial court erroneously failed to instruct the jury on "only" one element of the offense:

> a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, no matter how inescapable the findings to support that verdict might be. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element of the crime*. * * * The absence of a formal verdict on [one element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury.

Id. at 339 (emphasis added) (citations and quotations omitted). See also *Old Chief v. United States*, 1997 WL 3230, at *15 (U.S. Jan. 7, 1997) (O'Connor, J., joined by Rehnquist, Scalia

and Thomas, JJ., dissenting) ("The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of *every element* of the crime of which he is charged beyond a reasonable doubt") (emphasis added).

Justice Scalia's discussion in *Roy* confirms the court of appeals' reversible error in this case. By assessing the evidence on an element that the jury never considered, and by then *supplying* the jury's missing finding based upon its "certainty" that the verdict would have been the same anyway, the court of appeals violated petitioner's constitutional right to a jury determination of guilt. Indeed, by deciding that the omitted element was established by the evidence, the court of appeals directed a verdict in favor of the government on that element.

The court of appeals justified its weighing of the evidence by citing Justice Scalia's statement in *Carella* that an instruction that erroneously establishes a conclusive presumption can be harmless if it relates to an "element of the crime that the defendant in any case admitted." 491 U.S. at 270 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring) (citing *Johnson*, 460 U.S. at 87). The court of appeals' reliance on Justice Scalia's concurrence in *Carella*, however, is misplaced, twisting an opinion that resoundingly rejects the notion of appellate convictions into one that would embrace it. *Carella* involved an incorrect instruction concerning a *presumption*—not a missing element. The jury, notwithstanding the error, was correctly instructed on the required elements of the charged offense. That is, the instructional error did not involve the wholesale omission of an element, but a misinstruction as to how the element could be proven. In a case like *Carella*, an unequivocal in-court admission may indeed render a defective presumption harmless since it is reasonable to believe that such compelling evidence going directly to the "ultimate fact" might render the presumption superfluous. In that instance, a reviewing court can conclude that the jury in

fact made the requisite findings concerning the element in question. An admission in such circumstances renders an instructional error as to a presumption harmless *not* because the admission can substitute for a missing jury finding, but because it "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Johnson*, 460 U.S. at 87.

Whether a properly instructed jury would have found the element omitted by the district court below is a question that the court of appeals simply was not permitted to ask—let alone answer. Such an inquiry is permissible only "if the jury verdict on other points effectively embrace[d the missing point] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." *Roy*, 117 S. Ct. at 339-40 (Scalia, J., joined by Ginsburg, J., concurring) (citing *Carella*, 491 U.S. at 270-71 (Scalia, J., joined by Brennan, Marshall & Blackmun, JJ., concurring)).

That the court of appeals below may have viewed the evidence on the missing element overwhelming (a point petitioner strongly contests) is irrelevant:

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. * * * A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Sullivan, 508 U.S. at 280-81 (quoting *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)). "The absence of a formal verdict on [an omitted element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would

be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring).

Notwithstanding these basic tenets of constitutional law, the court of appeals below, like others before it, continue to issue appellate pronouncements of guilt on elements never considered by the jury. As recently explained by Chief Judge Edwards, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong." 70 N.Y.U. L. REV. at 1170.

Petitioner's conviction was not the product of "an actual jury finding of guilty." *Sullivan*, 508 U.S. at 280. Such an error cannot constitutionally be "harmless."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

FEBRUARY 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 94-4692
GEORGE G. ROGERS,	)	
Defendant-Appellant.	)	

Sept. 17, 1996.

Richard C. Klugh, Asst. Federal Public Defender, Ft. Lauderdale, FL, for Appellant.

Madeleine R. Shirley, Lisa T. Rubio, Linda Collins Hertz, U.S. Attorneys, Miami, FL, for Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

FLOYD R. GIBSON, Senior Circuit Judge:

* HONORABLE FLOYD R. GIBSON, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

A jury found appellant George Rogers guilty of committing various firearms violations named in a three count indictment. He now appeals the convictions, claiming that reversible error occurred when the district court failed to instruct the jury on an essential element of each of the offenses. Though the evidence presented at trial is insufficient to sustain the jury's verdict on one of the three counts, we deem the instructional omission tobe harmless beyond a reasonable doubt and thus affirm on the remaining two charges.

I. BACKGROUND

After arresting appellant George Rogers for driving while intoxicated, Broward County, Florida Deputy Sheriff Mahmoud Mashnouk searched both Rogers and the truck he had been driving. Deputy Mashnouk discovered that Rogers was carrying on his person a .22 caliber handgun and one magazine of .380 caliber ammunition. Inside Rogers's vehicle, Mashnouk found a loaded .380 caliber Baretta pistol equipped with a flash suppressor. In addition, the officer located beneath the driver's side seat of the truck a black bag containing a MAC-11 pistol, a silencer, a flash suppressor, .380 caliber ammunition, several ammunition magazines for the MAC-11, two holsters, and miscellaneous other items. Later investigation revealed that the MAC-11 had been fully modified to function as a "machinegun"[1] under federal law. Further, the silencer

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[1] "The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger...." 26 U.S.C. § 5845(b) (1994); see 18 U.S.C. § 921(a)(23) (1994) (providing that the term "machinegun," as used in 18 U.S.C. §§ 921-930, should be defined by reference to 26 U.S.C. § 5845(b)).

did not possess a serial number and had not been registered in the National Firearms Registration and Transfer Record.

Following his arrest, Rogers agreed to be interviewed by, among others, Special Agent Dale Armstrong from the Bureau of Alcohol, Tobacco, and Firearms. During this conversation, Rogers professed his expertise in weapons and correctly identified the silencer and the MAC-11. Nonetheless, Rogers vehemently denied ownership of those two firearms and claimed that he had no idea who might have placed them in his vehicle.

Thereafter, the United States returned an indictment charging Rogers with: 1) knowing possession of a machinegun in violation of 18 U.S.C. § 922(o) (1994) (count one); 2) knowing possession of a silencer not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§ 5861(d), 5871 (1994) (count two); and 3) knowing possession of a silencer without a serial number in violation of 26 U.S.C. §§ 5861(i), 5871 (1994) (count three). At trial, the Government played for the jury an edited audiotape of Rogers's postarrest interview.[2] Testifying on his own

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[2] As the following excerpts show, this recording revealed in no uncertain terms the depth of Rogers's familiarity with weapons, their construction, and their component parts:

[Rogers]: I don't know anything about [the ownership of the MAC-11 or the silencer].
[Agent]: Okay.
[Rogers]: And I definitely know what they are.
[Agent]: You do.
[Rogers]: Yes sir.
[Agent]: Okay, what are they?
[Rogers]: One is a uh, that is a .380, I think a MAC.
[Agent]: Okay.

(continued...)

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[2](...continued)

[Rogers]: And the other is a, that is a silencer.

* * * * * *

[Rogers]: You want to ask me how to make a silencer. I'll tell ya. You get, you get a [expletive] oil filter, that's the best silencer you can get. Don't they teach you that in, in a, in Special Forces? That's what they taught me.

* * * * * *

[Agent]: Do you know, do you know what these are?
[Rogers]: Yes sir.
[Agent]: What are those?
[Rogers]: Those are baffles for a silencer.

* * * * * *

[Agent]: How did you, how did you learn so much about, about silencers?
[Rogers]: I studied.
[Agent]: Studied?
[Rogers]: Yes, sir.
[Agent]: Okay.
[Rogers]: In fact if you probably go to my house now there's a book on silencers.

* * * * * *

[Rogers]: There's a book I think, unless I packed it away, I don't know.
[Agent]: Okay.
[Rogers]: Some screwball book I bought at a gun show.
[Agent]: Okay, anything ...
[Rogers]: But it's nothing we weren't taught.
[Agent]: Okay.

(continued...)

behalf, Rogers contended that the black bag seized by Deputy Mashnouk was not his, and he continued to maintain that he had no knowledge of how the illegal weapons came to be in his truck. Also, Rogers again positively identified the firearms that are the subject of this case.[3]

While instructing the jury on the pertinent offenses, the district court generally advised the panel that for each violation

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[2](...continued)

[Rogers]: You know, you want a silencer, you, you, you get a, what's the best silencer?
[Agent]: Sionics.
[Rogers]: No, it's, it's a two liter bottle. I mean everybody knows that, I mean this ...
[Agent]: A two liter Coke bottle you're telling me ...
[Rogers]: Yeah....

[3] The following exchange took place between Rogers and his attorney:

Q: Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A: This is a silencer, yes. I know exactly.

Q: You are familiar with it?

A: Yes.

* * * * * *

Q: Mr. Rogers, showing you Government's Exhibit No. 2, do you know what this is?

A: Yes. It's a .380 Ingram [MAC-11] and it was manufactured first for the police departments and then when war broke out they introduced it into the military....

the Government had to prove Rogers "knowingly possessed" the firearm in question. In explaining the law applicable to count 2, however, the court elaborated:

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.... What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Rogers objected to this instruction on the basis that the prosecution could not prevail unless it demonstrated beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the National Firearms Act, 26 U.S.C. §§ 5801-5872 (1994) (the "Act"). The district court overruled Rogers's objection.

The jury subsequently convicted Rogers on all counts; the district judge sentenced him to time served (thirty-three months), three concurrent three year terms of supervised release, and a special assessment of $150. Relying on the United States Supreme Court's recent opinion in *Staples* v. *United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), Rogers presently asserts the district court committed error when it refused to inform the jury that the Government was obligated to establish he knew the characteristics of the weapons at issue that subjected them to the Act's regulatory scheme.

II. DISCUSSION

The Act contains various directives, including registration requirements, that apply to a class of statutorily defined "firearms." See 26 U.S.C. §§ 5845(a), 5861 (1994). In

Staples, the Supreme Court addressed the mens rea element under § 5861(d) of the Act.[4] After expressing its reluctance to interpret laws in a manner that would "criminalize a broad range of apparently innocent conduct," *Staples*, 511 U.S. at ___, 114 S.Ct. at 1799 (quotation omitted), the Court concluded that the Government can procure a conviction under the subsection only when it proves the defendant "knew of the features of his [weapon] that brought it within the scope of the Act," *id.* at ___, 114 S.Ct. at 1804. We must now consider the effect of this holding, which overrules the previous law of this Circuit, *cf. United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S.Ct. 1312, 79 L.Ed.2d 710 (1984), on Rogers's convictions.

A. Rogers's Conviction Under 18 U.S.C. § 922(o)

With limited exceptions, 18 U.S.C. § 922(o) makes it unlawful for an individual to possess a machinegun. In a consonant voice, the parties contend that Rogers's conviction under this subsection should be reversed due to insufficient evidence. We agree.[5] The MAC-11 machinegun located in Rogers's truck had originally been manufactured as a semi-automatic pistol. Because the Government did not introduce any evidence showing that Rogers was aware that the MAC-11

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[4] Section 5861(d) makes it unlawful for a person to "receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d) (1994).

[5] We also agree with the Government that the Supreme Court's decision in *Staples* applies with equal force to prosecutions under 18 U.S.C. § 922(o).

had been altered to operate as a fully automatic weapon,[6] his conviction on this count cannot stand. See *Staples*, 511 U.S. at ___, 114 S.Ct. at 1804.

B. Rogers's Convictions Under 26 U.S.C. §§ 5861(d), (i), 5871

The jury also found that Rogers possessed an unregistered and unserialized silencer in violation of 26 U.S.C. §§ 5861(d), (i), 5871. These convictions pose a considerably more difficult problem on this appeal. As discussed above, the district court, over a defense objection, refused to inform the jury that the Government had the burden of showing Rogers "knew th[e] items in question were firearms" under the Act.[7] With the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d).[8]

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[6] Notably, the conversion process, which sometimes ensue from normal wear and tear, see *Staples*, 511 U.S. at ___, 114 S.Ct. at 1802, resulted in few, if any, noticeable changes in the outward appearance of the handgun.

[7] We underscore that the district court's instructions were entirely in accord with the law of this Circuit at the time of trial.

[8] The Court in *Staples* limited its analysis to § 5861(d), which prohibits the possession of an unregistered firearm. Section 5861(i), in turn, proscribes the possession of a firearm unidentified by a serial number. Because we adjudge the instructional error involved here to be harmless, for the purposes of this case only we will assume without deciding that the Court's pronouncements in *Staples* apply as well to criminal proceedings under § 5861(i).

In 1947, the Supreme Court stressed that in a criminal case "guilt is determined by the jury, not the court." *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 410, 67 S.Ct. 775, 783, 91 L.Ed. 973 (1947). This right, grounded in the Sixth Amendment,[9] to have the jury decide guilt or innocence reposes within that body the "overriding responsibility ... to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977). "Thus, although ajudge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan* v. *Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

While the Sixth Amendment ensures that the defendant's peers in the community will serve as the ultimate arbiters of his fate, the Fifth Amendment's Due Process Clause[10] creates the legal framework which guides the jury in its task. See *id.* at 277-78, 113 S.Ct. at 2080-81. Significantly, the Government bears the burden of proving beyond a reasonable doubt all elements of the crime charged. *Id.* Indeed, the Supreme Court has "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Put simply,

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[9] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." U.S. Const. amend. VI.

[10] "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V.

then, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278, 113 S.Ct. at 2081.

Given this background, it is readily apparent that in this case the district court committed an error of constitutional dimension when it declined to instruct the jury on an essential element of the crime. Our quite daunting task is to determine the effect of that error. Rogers asserts that the failure to instruct on an essential element of an offense is *per se* reversible. On the other hand, the Government predictably declares that affirmance is in order because the error was harmless. Neither we nor the Supreme Court has ever definitively ascertained the consequences that should follow from an instructional omission, and our sister circuits are divided on the issue.[11]

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[11] Some circuits have determined that an instructional omission mandates reversal regardless of the circumstances. See *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (explaining that harmless error analysis is inapplicable where an essential element "was withheld from the jury"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("[W]e conclude that the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the Chapman harmless error analysis does not apply."), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987). Other circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny. *Roy* v. *Gomez*, 81 F.3d 863, 866-67 (9th Cir. 1996) (*en banc*) (finding that harmless error analysis applies to a failure to instruct on an element of the offense); *United States* v. *Parmelee*, 42 F.3d 387, 392-93 (7th Cir. 1994) (same,) *cert. denied*, – U.S. –, 116 S.Ct. 63, 133 L.Ed.2d25 (1995).

(continued...)

To settle this dispute, we begin by recalling the benchmark decision in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). There, the Court rejected the notion that a constitutional error in all cases compels reversal. *Id.* at 22, 87 S.Ct. at 827. Rather, the encroachment at trial of a constitutional right may be considered harmless if the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. By so holding, the Court "continued a trend away from the practice of appellate courts in this country and in England of reversing judgments for the most trivial errors." *Connecticut* v. *Johnson*, 460 U.S. 73, 82, 103 S.Ct. 969, 975, 74 L.Ed.2d 823 (1983) (plurality opinion) (quotation and alteration omitted).

The *Chapman* Court did acknowledge, though, that there exist "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-28. Throughout the years, it has become evident that this limitation is confined to constitutional errors that cause a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

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[11](...continued)

We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority within our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful. See *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n. 2 (9th Cir. 1991); *cf. Teel* v. *Tennessee*, 498 U.S. 1007, 1007, 111 S.Ct. 571, 571, 112 L.Ed.2d 577 (1990) (White, J., dissenting from the denial of certiorari).

thus, we must reverse without regard to the underlying facts of a particular case where, for example, the defendant is totally deprived of the right to counsel, tried before a biased judge, refused his right to self-representation, or denied his right to a public trial. See *id.* at 309-10, 111 S.Ct. at 1264-65 (collecting cases). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose* v. *Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986) (citation omitted).

We would be hard pressed to conclude that incomplete jury instructions exemplify a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309, 111 S.Ct. at 1265. Instead, we liken the error before us to other "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evidence presented.'" *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2082-83 (quoting *Fulminante*, 499 U.S. at 307-08, 111 S.Ct. at 1264). Of particular relevance here are those cases dealing with the application of harmless error analysis to constitutionally defective jury instructions.[12] In

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[12] The Supreme Court has stated that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579, 106 S.Ct. at 3106. We find it telling that in only one case has the Supreme Court deemed an instructional error to be *per se* reversible. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The trial court in *Sullivan* had given a constitutionally defective reasonable doubt instruction that effectively "vitiate[d] all the jury's findings." *Id.* at 281, 113 (continued...)

Rose, the Court ruled that an error under *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), which erects an unconstitutional mandatory presumption shifting to the defendant the burden of proof on an element of the offense, could in some cases appropriately be the subject of harmless error review. *Rose*, 478 U.S. at 579-82, 106 S.Ct. at 3106-08. The Court restated this conclusion in *Carella* v. *California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (per curiam). More importantly, however, *Carella* included a cogent concurrence penned by Justice Scalia more precisely elaborating upon the type of harmless error inquiry suitable when reviewing a *Sandstrom* claim. See

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[12](...continued)
S.Ct. at 2082. Thus, in that case there was no finding of guilt beyond a reasonable doubt upon which harmless error scrutiny could operate. *Id.* at 280-81, 113 S.Ct. at 2082-83.

We realize that at least one Court has relied upon *Sullivan* to foreclose the possibility of harmless error review where there has been an instructional omission. See *Pettigrew*, 77 F.3d at 1511. With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one. Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate. See *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (observing that *Sullivan* does not prevent harmless error review where "the district court's failure to let the jury decide the [omitted] issue did not prevent the jury from properly deciding the other issues in the case").

Carella, 491 U.S. at 267-73, 109 S.Ct. at 2421-24 (Scalia, J., concurring).

Other circuits have indicated that Justice Scalia's concurrence in *Carella* outlines the harmless error framework to be used in appeals involving instructions that omit an essential element of the offense. *Roy*, 81 F.3d at 866-67; *Parmelee*, 42 F.3d at 392-93. We understand full well that there are some important differences between the incomplete instructions in this case and the *Sandstrom* violation at issue in *Carella*. Nonetheless, we, too, find Justice Scalia's concurrence persuasive in the instant context and therefore deem the reasoning of that opinion to be applicable when adjudicating the effect of instructional omissions. *Cf. Carella*, 491 U.S. at 270, 109 S.Ct. at 2423 (Scalia, J., concurring) (suggesting that all errors in instructions that "deprive[] the jury of its factfinding role" should be evaluated similarly).

According to Justice Scalia, where the trial court's directions prevented the jury from determining guilt beyond a reasonable doubt on every element of the offense, due regard for the defendant's Fifth and Sixth Amendment rights necessitates that harmless error analysis be available only in those "rare situations when the reviewing court can be confident that such an error did not play any role in the jury's verdict." *Id.* at 270, 109 S.Ct. at 2423 (quotations and alteration omitted). Consequently, an instructional omission, similar to a *Sandstrom* error, may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also

finding the element.[13] See *id.* at 270-71, 109 S.Ct. at 2423-24.

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[13] In deciding that a constitutional error of the sort involved here can in some situations be harmless, we take comfort in our own prior opinions. Though before today we have not directly addressed whether an instructional omission can constitute harmless error, our Court has never treated this type of flaw as reversible *per se*. See *United States* v. *Miller*, 22 F.3d 1075, 1079-80 (11th Cir. 1994) (holding that omission was not plain error); *Knight* v. *Dugger*, 863 F.2d 705, 707, 730-31 (11th Cir. 1988) (adopting and appending district court's opinion finding omission harmless); *United States* v. *Duncan*, 855 F.2d 1528, 1531-32 (11th Cir. 1988) (failing to find plain error), *cert. denied*, 489 U.S. 1029, 109 S.Ct. 1161, 103 L.Ed.2d 220 (1989); *Adams* v. *Wainwright*, 764 F.2d 1356, 1363-64 (11th Cir. 1985) (concluding that omission was not reversible), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). In *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984), this Court held that it cannot be harmless when the trial court directs a verdict on an element of the crime charged. We wholeheartedly accept this observation as an accurate recitation of the law. See *Rose*, 478 U.S. at 578, 106 S.Ct. at 3106 ("[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury.") We do not, however, equate an instructional omission with a directed verdict. In contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue. See *Roy*, 81 F.3d at 866-67 (distinguishing between an omission and a directed verdict on an element). Accordingly, we do not believe the Court's opinion in Goetz precludes us from finding the error here to be harmless. But see *United States* v. *Mentz*, 840 F.2d 315, 324 n. 17 (6th Cir. 1988) (refusing to distinguish between an omission and a directed verdict on an element).

Employing this standard in the appeal currently before us, we are confident that the facts of this case fall squarely within the second category listed above. In his postarrest interview, which was reproduced for the jury via audiotape, and again on the witness stand at trial, Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. In fact, Rogers is a self-described student of silencers who had purchased at least one book on the subject. Moreover, Roger's attorney during closing argument reiterated and attempted to downplay the defendant's concession on this point.[14] These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any case admitted.

Given Rogers's open and forthright admission, we may find the instructional error harmless if we decide that the Government has "prove[d] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. "The inquiry, in

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[14] Rogers's attorney argued to the jury:
They make, [the] Government makes a big deal about the fact that Mr. Rogers readily is able to identify and explain what all these items are. They want you to take a quantum leap then because of that assume that there is [sic]. Well that's not the case. Mr. Rogers testified that he has been around firearms since the '60's--or since he was a child; that he has used silencers unfortunately in Vietnam where he was wounded. So, sure, he knows what silencers are. Big deal. He knows what automatic weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes, he knows what they are and he honestly said "Yes, I know what they are," and expends [sic] what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081. We have absolutely no difficulty in concluding that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction. In light of the relevant evidence evaluated by the jury, including Rogers's repeated admissions, we hold that the omission was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates* v. *Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991). It follows that Rogers's convictions for violating 26 U.S.C. §§ 5861(d), (i), 5871 must be affirmed.[15]

III. CONCLUSION

Due to the Supreme Court's recent opinion in *Staples*, we are constrained to reverse for insufficiency of the evidence Rogers's conviction for violating 18 U.S.C. § 922(o). Still, because we have determined that the constitutional error committed by the district court when instructing the jury was harmless beyond a reasonable doubt, we affirm Rogers's convictions for violating 26 U.S.C. §§ 586(d), (i), 5871.

AFFIRMED in part and REVERSED in part.

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[15] This case represents another "concrete example of why it would be a quixotic exercise of form over substance to deny under all circumstances the application of harmless error analysis to an instructional omission on an uncontested issue." *Hennessy*, 929 F.2d at 515.

[File-Stamped Jan. 6, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4692

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE G. ROGERS,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONTON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

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* Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

United States District Court

Southern District of Florida

UNITED STATES OF AMERICA
v.
GEORGE G. ROGERS
Marshal #29123-004

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)

Case Number:
91-6044-CR-ROETTGER
A.U.S.A.-Bardfeld
Edward Salantrie, Esq.
633 S.E. 3rd Ave. #4F
Ft. Lauderdale, FL 33301

THE DEFENDANT:

☐ pleaded guilty to count(s)_____
■ was found guilty on count(s) 1, 2 & 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18;922(o)	Possession of a machine gun	3/15/91	1
26;5861(d)	Possession of unregistered silencer		2
28;5861(i)	Possession of silencer w/out serial number.		3

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

■ It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) 1, 2 & 3, which shall be due ■ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 406-50-4016

Defendant's Date of Birth: 8/9/39

June 2, 1994
Date of Imposition of Sentence

Defendant's Mailing Address:

5460 N.W. 36th Terrace
Ft. Lauderdale, FL 33309

Defendant's Residence Address:

_____
_____

/s/
Signature of Judicial Officer

NORMAN C. ROETTGER
CHIEF UNITED STATES DISTRICT COURT JUDGE
Name & Title of Judicial Officer

7 June 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TIME SERVED as to each Count 1, 2 & 3, to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for the district,

a.m.
☐ at _____ p.m. on _____
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE years as to each Count 1, 2 & 3 to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

■ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

■ The defendant shall not possess a firearm or destructive device.

Further defendant shall submit to a reasonable search & seizure of person, auto, boat and residence when requested by the probation officer. The defendant shall participate in a mental health treatment program approved by the probation office, if deemed necessary by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in resident or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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No. 96-1279

In the Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Carella v. *United States*, 491 U.S. 263 (1989)	5, 6
Chapman v. *California*, 386 U.S. 18 (1967)	6
Connecticut v. *Johnson*, 460 U.S. 73 (1983)	5-6
Staples v. *United States*, 511 U.S. 600 (1994)	4, 5

Statutes and rule:

18 U.S.C. 922(*o*)	2, 4
18 U.S.C. 5845	3
18 U.S.C. 5845(a)	2
26 U.S.C. 5861	2
26 U.S.C. 5861(d)	2, 3, 4, 5
26 U.S.C. 5861(i)	2, 4, 5
Fed. R. Crim. P. 52(b)	6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. A petition for rehearing was denied on January 6, 1997 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on February 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of knowingly possessing a

machinegun, in violation of 18 U.S.C. 922(*o*); one count of knowingly possessing a silencer not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d); and one count of knowingly possessing a silencer that lacked a serial number, in violation of 26 U.S.C. 5861(i). He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. The court of appeals reversed petitioner's conviction for possessing a machinegun. The court affirmed petitioner's other convictions. Pet. App. 1a-17a.

1. On March 15, 1991, petitioner was arrested for drunk driving. Gov't C.A. Br. 2-3. The arresting officer searched petitioner's truck and discovered several firearms, including a MAC-11 pistol, a silencer, a flash suppressor, and ammunition. Later investigation showed that the MAC-11 had been modified to function as a machinegun, and that the silencer did not have a serial number and had not been registered in the National Firearms Registration and Transfer Record. Pet. App. 2a-3a. Petitioner denied that he owned the MAC-11 or the silencer, but he did identify the two items with confidence and precision. *Id.* at 3a-5a & n.2.

2. Under 26 U.S.C. 5861, it is illegal to possess unregistered or unserialized items that, like silencers, fall within the definition of "firearm" contained in 26 U.S.C. 5845(a). At trial, the district court instructed the jury that, to convict petitioner under Section 5861, it had to find, among other things, that he "knowingly possessed a 'firearm,' as defined [in Section 5845]." Gov't C.A. Br. 8. The court did not clearly instruct the jury that, to convict, it had to find that petitioner specifically knew that the item in his possession was a silencer or that it had the

characteristics that subject it to regulation under Section 5845.[1] Petitioner objected that the instruc-

---

[1] With respect to the count charging petitioner with possessing an unregistered "firearm," in violation of 26 U.S.C. 5861(d), the court instructed:

> Count II: Title 26, U.S. Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms which are not registered to them in the National Firearms Registration and Transfer Record.
>
> Title 26, U.S. Code, Section 5845, defines "firearm" as including a silencer.
>
> The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First: That the Defendant knowingly possessed a "firearm," as defined above;
>
> Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record.
>
> It is not necessary for the Government to prove the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.
>
> Let me just stop here right now and look up, folks. That doesn't mean the ordinary pistol, shotgun, rifle that anybody can buy. It's just the certain ones that—It's confusing because we use the term "firearm" for that same thing that's so very lawful. It's just these certain things that are defined that have to be registered in the National Firearms Registration and Transfer Record.
>
> What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined

tions should have required the government to prove that he specifically "'knew th[e] items in question were firearms' under the National Firearms Act." Pet. App. 6a.

3. In *Staples* v. *United States*, 511 U.S. 600 (1994), this Court held that, to obtain a conviction under Section 5861(d), the government must prove that the defendant "knew of the features of his [firearm] that brought it within the scope of the Act." 511 U.S. at 619. On appeal, petitioner relied on *Staples* to argue that his convictions on all three counts were invalid. The government conceded that *Staples* required reversal of petitioner's conviction for possession of a machinegun under Section 922(*o*), because the evidence at trial had not proven that petitioner knew that the MAC-11 had been modified to act as a fully automatic weapon. The court of appeals agreed and reversed petitioner's conviction on that count. Pet. App. 7a-8a.

Petitioner also argued that *Staples* required reversal on the other two counts because the court had not instructed the jury that, to convict on those counts, it had to find that petitioner had known that the silencer in his possession was, in fact, a silencer. The court of appeals agreed with petitioner that the district court's instruction on that point was erroneous under

---

above, and that is was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Gov't C.A. Br. 8. The court issued a similar instruction with respect to the count charging petitioner with possessing a "firearm" without a serial number, in violation of 26 U.S.C. 5861(i). Gov't C.A. Br. at 8-9.

Staples. Pet. App. 8a.[2] The court held, however, that the error was harmless because the instructional "omission" at issue "related to an element of the crime that the defendant * * * admitted." Pet. App. 14a (citing *Carella* v. *United States*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring)); see *id.* at 16a. The court noted that, at trial, petitioner "emphatically and without reservation admitted that he knew the item found in his truck was a silencer," a concession reaffirmed by his "attorney during closing argument." *Id.* at 16a; see also *id.* at 16a n.14. As a result, the court held that the guilty verdict was unattributable to the instructional error and was, therefore, harmless beyond a reasonable doubt. *Id.* at 17a.

DISCUSSION

Petitioner contends (Pet. 10-25) that the court of appeals' application of harmless-error analysis to the instructional error in this case was wrong and inconsistent with decisions of other courts of appeals. There is apparent disagreement among the courts of appeals on the availability of harmless-error review when an instructional error removes an element of an offense from a jury's consideration. Nonetheless, petitioner cites no conflict—and we are aware of none—on the narrow issue decided by the court of appeals in this case: whether an instructional error may be found harmless in the "rare situation[]," presented here, in which the error related to "an element of the crime that the defendant * * * admitted." *Carella* v. *United States*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring) (citing *Connecticut* v. *John-*

---

[2] Noting that *Staples* dealt only with Section 5861(d), the court of appeals assumed, without deciding the issue, that the same analysis would apply to Section 5861(i).

son, 460 U.S. 73, 87 (1983) (plurality opinion)). The court of appeals' judgment rests on its conclusion that, in view of petitioner's "unequivocal assertions" (Pet. App. 16a) of knowledge that he possessed a silencer, the instructional error "did not contribute to the verdict obtained." *Ibid.* (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). That conclusion was correct, and petitioner's discussion of purported conflicts on other harmless-error points is not properly presented here.

This Court may nevertheless wish to hold the petition pending its decision in *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997), which also involves an issue concerning the availability of appellate relief when an instruction erroneously withholds an element from the jury's consideration. As petitioner correctly observes (Pet. 16 n.7), our contention in *Johnson* is that the forfeited instructional error at issue there is properly addressed under the plain-error standard of Rule 52(b) rather than under the harmless-error standard applicable here. Nonetheless, the petitioner in *Johnson* argues that, on the facts of that case, her failure to object did not subject her to the more rigorous plain-error standard and that, in any event, an instructional omission always requires reversal under either harmless- or plain-error review. See, *e.g.*, Brief for Petitioner at 31 in *Johnson*, *supra* ("an error such as that presented in this case is not amenable to analysis under Rule 52(a) or (b)"). This Court's resolution of *Johnson* could, therefore, bear on the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

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No. 96-1279

IN THE

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OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

8 pp

TABLE OF AUTHORITIES

Page

Cases

Carella v. *California*, 491 U.S. 263 (1989) 2, 3

Chapman v. *California*, 386 U.S. 18 (1967) 2, 4

Estelle v. McGuire, 502 U.S. 62 (1991) 4

Old Chief v. United States, 117 S. Ct. 644 (1997) 4

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 2

United States v. *Johnson*, No. 95-6556
(argued February 25, 1997) 2, 5

United States v. *Olano*, 507 U.S. 725 (1993) 5

Statutes and Rules

Fed. R. Crim. P. 52 5

Miscellaneous

Brief for the United States,
Old Chief v. *United States* (No. 95-6556) 4

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REPLY BRIEF FOR THE PETITIONER

The United States' Brief essentially concedes that the grounds on which petitioner seeks certiorari are uncontested. It is undisputed that the district court failed to instruct the jury on an essential element of the offenses with which petitioner was charged and convicted. It also is uncontested that the jury made no factual findings with respect to this omitted element. And it is likewise agreed that "[t]here is apparent disagreement among the courts of appeals on the availability of harmless-error review when an instructional error removes an element of an offense from a jury's consideration." U.S. Br. 5. Finally, the United States makes no attempt to diminish the exceptional importance of this constitutional question, or the need for Supreme Court review thereof.

citing Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), the United States maintains that certiorari may not be appropriate given the Eleventh Circuit's holding that the instructional error was harmless because petitioner supposedly "admitted" the element omitted from the trial court's instructions. And second, the United States suggests that the Court may wish to hold the Petition pending its ruling in *United States* v. *Johnson*, No. 95-6556 (argued February 25, 1997). As we demonstrate below, neither of these concerns is well-founded, and neither cast any doubt on the fact that this case provides the Court with an ideal opportunity to resolve the important and unanswered constitutional question presented in the Petition.

1. In suggesting that the Eleventh Circuit's decision is not worthy of review, the United States' Brief conflates the two entirely separate questions that arise when harmless error is urged as basis for affirmance on appeal. As this Court explained in *Chapman v. California*, 386 U.S. 18 (1967), whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" *Id.* at 20. Of course, if the appellate court answers the first question in the negative, there is no need to answer the second, for if the error is one that cannot be harmless under the Constitution, it makes no difference whether the error was actually harmless. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

The question presented by petitioner relates solely to the *first* of the harmless error questions posed in *Chapman, i.e.*, can the erroneous removal of an essential element of the charged offense from a jury's consideration "be held to be harmless"? In this case, the Eleventh Circuit unequivocally answered that question in the affirmative, holding that such an error is not "a 'structural defect[] in the constitution of the trial

mechanism, which def[ies] analysis by 'harmless error' standards,'" since "the jury will have made a constitutionally valid determination of guilt on all issues save one." Pet. App. 12a & n.12. In so doing, the court readily acknowledged that its holding on this constitutional question was in direct conflict with those of other circuits, and that Supreme Court review of the question was necessary. *Id.* at 10a-12a, n.11. See also *id.* at 11-16 (discussing split in the circuits and state courts of last resorts)

Having answered the first *Chapman* question in the affirmative, the Eleventh Circuit proceeded to address the second question, holding that the error below was harmless since "the instructional omission related to an element of the crime that the defendant in any event admitted." Pet. App. 17a. In doing so, the court of appeals relied heavily upon Justice Scalia's concurrence in *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam). Yet, contrary to the suggestion in the United States' Brief, the Eleventh Circuit's answer to this secondary question has no bearing at all on the question presented in the petition, which relates solely to the threshold issue of whether the instructional error in this case is one that constitutionally can *ever* be held to be harmless.

The Eleventh Circuit's opinion makes clear that it regarded the question of whether petitioner "admitted" the essential element omitted from the trial court's instructions to relate solely to the question of whether the error was harmless — not to whether harmless error review is constitutionally appropriate in the first instance. The court of appeals only relied on Justice Scalia's concurrence in *Carella* to judge "the effect of instructional omissions" on the proceedings below and to determine whether the error could "be viewed as harmless." Pet App. 14a. Indeed, Justice Scalia's concurrence in *Carella* — which concerned the use of conclusive presumptions on an element presented to the jury — should not be read as

suggesting that harmless error analysis is constitutionally appropriate whenever a defendant admits (or is alleged to have admitted) an essential element that wrongly has been omitted from the trial court's instructions. Nor is there any support for such a proposition in this Court's decisions. As this Court unanimously held in *Estelle v. McGuire*, 502 U.S. 62, 69 (1991), "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Most recently, Justice Scalia himself joined in the dissenting opinion of Justice O'Connor in *Old Chief v. United States*, 117 S. Ct. 644 (1997), which again reiterated that "[a]t trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element." *Id.* at 659 (dissenting opinion). Even the United States advocated this point in *Old Chief*. See Brief for the United States, *Old Chief v. United States* (No. 95-6556), at 22.

In short, as the court of appeals' decision itself reflects, the question of whether petitioner admitted the omitted essential element (a point he strongly contests) has no bearing at all on the question presented in the Petition or the propriety of review by this Court.

The United States nonetheless argues that because it believes the court of appeals was correct in finding the instructional error to be harmless, the question of whether harmless error review can be applied "is not properly presented here." U.S. Br. at 6. In fact, the government's argument stands *Chapman* harmlss error analysis on its head. As this Court made clear in *Chapman*, 386 U.S. at 20, if the error in question is one that cannot constitutionally be harmless, it is irrelevant whether the error was actually harmless or not. Accordingly, whether the court of appeals correctly found the

error below to be harmless has no bearing at all on the threshold question, presented here, of whether such errors are even amenable to harmless error review. In fact, even if one assumes, *arguendo*, that the instructional error below was harmless, this would only serve to *confirm* that the question presented is ideally framed for Supreme Court review here, since its resolution would be wholly dispositive in this case.

2. The United States also suggests that this Court may wish to hold the petition pending its decision in *Johnson v. United States*, No. 96-203 (argued Feb. 25, 1997). There is no reason at all for the Court to hold the petition, as this case bears little resemblance to *Johnson*. As the Government acknowledges, the petitioner in *Johnson* failed to object at trial to having the element of materiality decided by the court rather than the jury. Accordingly, the questions presented in *Johnson* necessarily will turn upon an application of Fed. R. Crim. P. 52. In sharp contrast, the question presented here is entirely of constitutional dimension, since petitioner made a timely objection to the instructional error. Indeed, the United States' Brief provides no explanation at all as to how any ruling in *Johnson* could resolve the constitutional question presented, or dictate the outcome, in this case. In *United States v. Olano*, 507 U.S. 725, 731 (1993), this Court held that "a constitutional right * * * may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Since no timely objection was asserted in *Johnson*, and since *Johnson* thus involves an application of the plain error doctrine — not the harmless error doctrine at issue here — there is little prospect that the Court will resolve in *Johnson* the constitutional question presented here. In short, there is no reason for this Court to hold the petition in this case pending its ruling in *Johnson*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

TABLE OF AUTHORITIES

Page

Cases

Chapman v. *California*, 386 U.S. 18 (1967) 1

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 1, 2

United States v. *Johnson*, No. 95-6556 (U.S. May 12, 1997) 1, 2

United States v. *Olano*, 507 U.S. 725 (1993) 2

Statutes and Rules

Fed. R. Crim. P. 52 2

IN THE

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

In its Brief, the United States suggested that this Court hold the Petition in this case pending this Court's decision in *Johnson v. United States*, No. 95-6556, and that the Petition then be "disposed of accordingly." U.S. Br. 7. On May 12, 1997, this Court announced its decision in *Johnson*. As the Court's opinion makes clear, *Johnson* does not, and makes no attempt to, resolve the question presented by petitioner, *i.e.*, whether the failure to instruct the jury on an essential element of an offense can ever constitutionally be "harmless" under *Chapman v. California*, 386 U.S. 18 (1967), and *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), where a timely objection to the error is made at trial. To the contrary, *Johnson* explicitly left this important question for another day. As explained in the Petition, this case provides the Court with an ideal vehicle to resolve that question.

The Court's decision in *Johnson* strictly involved an application of the plain error doctrine of Fed. R. Crim. P. 52(b), because the defendant failed to object to the error in question at trial. This Court held that the error in that case was not reversible under Rule 52(b) because the petitioner did "not meet the final requirement" of the plain error test articulated in *United States v. Olano*, 507 U.S. 725 (1993). See Slip op. at 8. Given the narrow scope of this holding, this Court emphasized that it "need not decide th[e] question" of whether the instructional omission of an essential element could ever constitutionally be considered "harmless." *Ibid.*

Johnson itself confirms the need for Supreme Court review of the question presented here. As the Court noted, the question of whether the failure to submit an essential element to the jury can ever be harmless "is by no means clear." Slip op. at 8. This Court also pointed out that, under its harmless error decisions, removal of an essential element from the jury "can just as easily be analogized to improperly instructing the jury on an element of the offense * * *, an error which is subject to harmless-error analysis, as it can be to failing to give a proper reasonable-doubt instruction altogether" (*ibid.*), which is not amenable to harmless error review. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

In any event, the Court's decision in *Johnson* purports neither to address nor to answer the question presented here. Accordingly, *Johnson* clearly will not resolve the irreconcilable conflict that now pervades the circuits and the state courts of last resort on the question of whether the instructional omission of an essential element can constitutionally ever be harmless. See Pet. 11-16. For all of these reasons, and because this important and recurring question is ideally framed for review in this case, Petitioner respectfully urges the Court to grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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JOINT APPENDIX

JAVIER H. RUBINSTEIN*
JAMES D. HOLZHAUER
ROBERT M. DOW
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

WALTER DELLINGER*
Acting Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2217

Counsel for Respondent

* Counsel of Record

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113 pp

TABLE OF CONTENTS

PAGE

Relevant Docket Entries Not Included 3

Relevant Docket Entries From The Court of Appeals 2

Relevant Docket Entries From the District Court 3

Arrest Report 5

Indictment 6

Defendant's Proposed Non-Pattern Jury Instructions . . . 10

Opening Jury Instructions 13

Excertps of Transcript of Proceedings

- Excerpts of Opening Statement of Defendant 17
- Sidebar Colloquy 18
- Cross-examination of Mahmoud Mashnouk 18
- Direct Examination of Richard Craze 23
- Direct Examination of Dale Armstrong 26
- Transcript of Audiotaped Post-Arrest Interview . . 28
- Con'd. Direct Examination of Dale Armstrong . . . 52
- Preliminary Charge Conference 53
- Direct Examination of George Rogers 57

PAGE

Cross-Examination of George Rogers 71

Charge Conference 77

Closing Argument of Defendant 88

Jury Instructions 99

Entry of Verdict 108

Excerpts of Sentencing Hearing 109

Government Exhibit 16
(Photograph of Seized Items) 111

RELEVANT DOCKET ENTRIES NOT INCLUDED

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Judgment of the United States District Court for the Southern District of Florida, dated June 7, 1994 . . . . 20a

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 17, 1996 . . . . . 1a

Order of the United States Court of Appeals for the Eleventh Circuit, entered January 6, 1997 . . . . . 18a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

George G. Rogers, Appellant

v. No. 94-4692

United States, Appellee.

RELEVANT DOCKET ENTRIES

EVENT	DATE
Appeal docketed	July 5, 1994
Record on Appeal filed	April 28, 1995
Brief for Appellant filed	July 7, 1995
Brief for Appellee filed	August 10, 1995
Reply Brief for Appellant filed	September 27, 1995
Oral Argument held	March 29, 1996
Opinion issued	September 17, 1996
Petition for Rehearing En Banc filed	October 8, 1996
Petition for Rehearing denied	January 6, 1997

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

United States of America

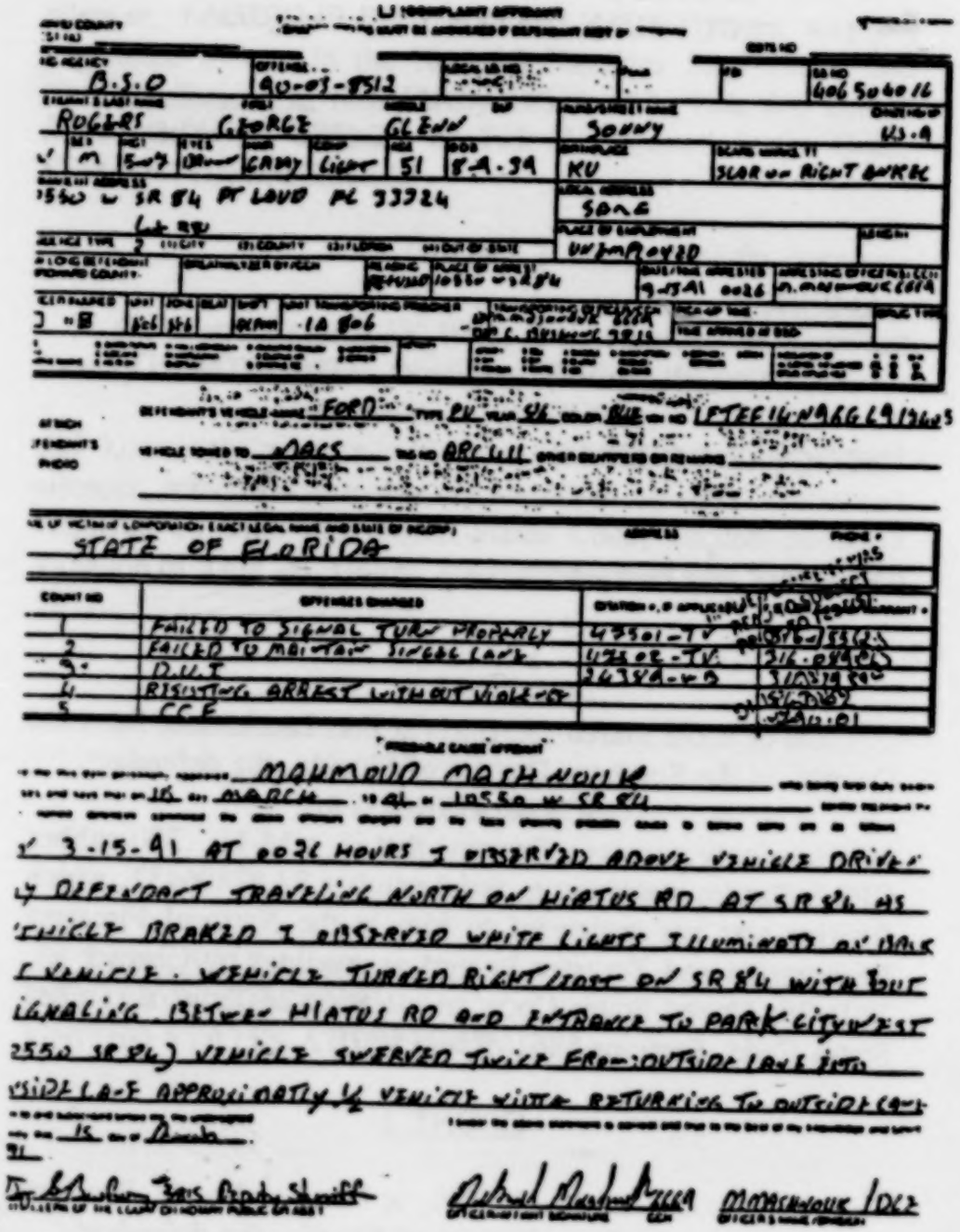
v. No. 91-6044 CR NCR

George G. Rogers, Defendant.

RELEVANT DOCKET ENTRIES

EVENT	NO.	DATE
Indictment filed	1	March 21, 1991
Arrest warrant issued	2	March 21, 1991
Arrest warrant executed	6	April 26, 1991
Superseding indictment filed	27	September 9, 1992
Defendant released on bond	55	December 17, 1993
Jury trial held	61	March 28-31, 1994
Court's instructions to the jury	62	March 30, 1994
Defendant's proposed non-pattern jury instructions	63	March 28, 1994
Guilty verdict entered	65	March 31, 1994

EVENT	NO.	DATE
Motion for new trial and for judgment of acquittal filed	67	April 8, 1994
Response to motion for new trial	68	May 2, 1994
Denial of motion for new trial	69	May 20, 1994
Sentencing hearing	72	June 2, 1994
Order sentencing defendant to imprisonment of time served, 3 years supervised release, and special assessment of $150.00	73	June 7, 1994
Notice of Appeal filed	75	June 8, 1994



B.S.O 90-03-8512 406 50 60 16
ROGERS GEORGE GLENN SONNY
M KU SLAR or RIGHT BURKE
5540 W SR 84 FT LAUD FL 33324 SAME
10 806
FORD PU 96 LFTEE16:NAGG69126
TOWED TO MACS ARC 111
STATE OF FLORIDA

COUNT NO	OFFENSES CHARGED	STATUTE & DEGREE
1	FAILED TO SIGNAL TURN PROPERLY	316.155(1)
2	FAILED TO MAINTAIN SINGLE LANE	316.089(1)
3	DUI	316.193
4	RESISTING ARREST WITHOUT VIOLENCE	843.02
5	CCF	893.13(6)

MAHMOUD MASHNOUK
16 MARCH 91 1550 W SR 84

3-15-91 AT 0026 HOURS I OBSERVED ABOVE VEHICLE DRIVEN BY DEFENDANT TRAVELING NORTH ON HIATUS RD AT SR 84. VEHICLE BRAKED I OBSERVED WHITE LIGHTS ILLUMINATE ON REAR OF VEHICLE. VEHICLE TURNED RIGHT (EAST ON SR 84 WITHOUT SIGNALING BETWEEN HIATUS RD AND ENTRANCE TO PARK CITY WEST (550 SR 84) VEHICLE SWERVED TWICE FROM OUTSIDE LANE INTO INSIDE LANE APPROXIMATELY ½ VEHICLE WIDTH RETURNING TO OUTSIDE LANE
16 March

Deputy Sheriff — Broward Sheriff's Office

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO._____
26 USC 5861(d)and 5871
26 USC 5861(i) and 5871

UNITED STATES OF AMERICA	)	
v.	)	INDICTMENT
GEORGE G. ROGERS	)	

The Grand Jury charges that:

COUNT 1

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,
did knowingly possess a firearm, that is, a M-11, .380 caliber RPB Industries machinegun, serial number SAP3806432, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 2

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,

did knowingly possess a firearm, that is, a 9" by 1 3/4" silencer, bearing no serial number, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 3

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,
did knowingly possess a firearm, that is, a 9" by 1 3/4" silencer, which firearm was not identified by serial number as required by Title 26, United States Code, Section 5842; in violation of Title 26, United States Code, Sections 5861(i) and 5871.

A TRUE BILL

_____
FOREPERSON

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO._____

UNITED STATES OF AMERICA	)	
	)	
v.	)	ESTIMATED TRIAL TIME
	)	
GEORGE G. ROGERS	)	

CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the indictment/ information.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28, U.S.C., Section 3161.

3. This cause will take 0-5 days for the parties to try.

4. (Check the appropriate category)

_X_ I 0 to 5 days

____ II 6 to 10 days

____ III 11 to 20 days

____ IV 21 to 60 days

____ V 61 days and over

5. Has this case been previously filed in this Court? NO If Yes, Judge _____, Case Number _____

6. Was this matter pending in the Office of the United States Attorney as of August 16, 1985?

_____	_X_
Yes	No

/s/ Lynn D. Rosenthal
LYNN D. ROSENTHAL
ASSISTANT UNITED STATES
ATTORNEY

Defendants Requested Jury Inst #1 91-6044-CR-NCR
USA v. Rogers

Mere proximity to an illegal firearm, standing alone, is insufficient to find the Defendant guilty of possession of illegal firearms.

US v Gates, 491 F.2d 720 (7th Cir. 1974)

RECEIVED & FILED IN OPEN COURT
ON 3/28/94 AT
Ft. Lauderdale, FLA.
T. G. Cheleotis, Clerk
United States District Court
Southern District of Florida

_____ Approved

__✓__ Denied

_____ Modified

Defendants Requested Jury Instruction #2

A person who is not in actual possession, but who knowingly has both the power and the intention to later take control over something, is in constructive possession of it.

US v Daniels, 527 F.2d 1147 (6th Cir. 1975)

_____ Granted

__✓__ Denied

_____ Modified

Defendants Requested Jury Instruction #3

To establish "knowing possession" of a firearm, the Government must prove beyond a reasonable doubt that the defendant willfully and consciously possessed items which he knew to be "firearms."

US v Parker, 566 F.2d 1304 (5th Cir. 1978)

US v Freed, 91 S. Ct. 1112 (1971)

J. Blackmun
8th Cir.

_____ Granted

__✓__ Denied

_____ Modified

OPENING JURY INSTRUCTIONS

[Tr. 78] THE COURT: Let me go over a few things with you before we begin. You may be wondering what qualifications you have to be a juror. Some of you have not been jurors before and let me assure you that you are admirably qualified to be a juror because of something you have been in training for all of your lives.

I say that because the major task of a juror is to determine credibility, believability of the witnesses. You have been training for it all of your lives because even little babies make credibility choices. They don't jump into the arms of strangers but they tend to crawl to parents or grandparents. And you have been doing this all the way along. You evaluate everybody you meet, everybody you talk with every day.

We have a number of colloquialisms we use and they all describe credibility. Some people we size them up. And some people we take what they say with a grain of salt. Others, his word is his bond. Still others, I wouldn't believe him if he was standing on a stack of bibles. You've probably used all those phrases. They all deal with credibility, believability. And that's the major function of [Tr. 79] the jury I think and that's why the jury system works so well.

You are particularly good at evaluating credibility, who's telling the truth, the whole truth and nothing but the truth and who's not. So it's the same whether it's a criminal case or an auto accident, intersectional collision, who had the red light and who didn't. You'll be able to figure it out.

And the same is true in any kind of a trial. Now, breach of contract cases try your patience a little more. A mal is sometimes a little more interesting but they usually do settle out on stuff like that. Now you have seen a lot of movies on television, in the movie theatre and they bare [sic] some resemblance to reality. The one way that they definitely bare [sic] a resemblance to reality is that the lawyers will be asking

questions of the witnesses and occasionally the lawyer from the other side will object. What does that mean?

It raises a question of law which is my department and I have to rule on it. If someone asks a question and there is an objection and I either sustain the objection or overrule it. If I overrule the objection the witness may answer the question and you may consider both the question and the answer. If I sustain the objection the witness is not supposed to answer and you should disregard the question. But if they answer and I sustain the objection, ignore both the question and the answer.

[Tr. 80] Let me state it for you another way.

Nothing a lawyer says in a courtroom is evidence, absolutely nothing, accept a question when it's coupled with an answer. That becomes evidence and you may consider it.

If you have a question and an objection and I overrule the objection, the witness may answer and you may consider it.

If there is a question and an objection and I sustain the objection, ignore the question, it's just lawyer talk.

If there is a question and an objection and I sustain it and I'm too slow in ruling or the witness has blurted out an answer and sometimes they don't know to stop, if I sustain the objection, but the witness has already answered the question, ignore both the question and the answer if I sustain the objection.

Now the case will proceed in the following manner. The first thing which will happen here this afternoon the lawyers make an opening statement. That's kind of like a preview of coming attractions. It's been likened to the picture on top of a jigsaw puzzle box. And that may be the best analogy because evidence comes to you in bits and pieces and the picture will give you an idea of what the evidence will look like when all the pieces of evidence have been presented.

[Tr. 81] Now what the lawyers say is not evidence.

The government goes first and then the defendant. And the government goes first in everything just about because the government has the burden of proof beyond a reasonable doubt.

The opening statements are not evidence. And when we recess today there won't have been any evidence in the case when you go home tonight. Tomorrow morning we'll get to the reception of evidence and the government here again goes first.

Then tomorrow or whenever after the government rests, the defendant may present evidence; but a defendant does not have to do so. After that, if the government has any rebuttal evidence after the defendant rests, then the government may present rebuttal evidence if there has been any evidence presented by the defendant.

When the parties all rest then we come to closing arguments by the lawyers and then I shall instruct you on the law that is applicable to this case. Not until then can you discuss the case among yourselves. I will give you plenty of warning whenever we get to that point.

There is one instruction that I think is important enough that I need to go over with you now as well as later and let me briefly touch on that at this point.

The indictment or formal charge against a defendant [Tr. 82] is not evidence of any kind. Indeed the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all; and if a defendant elects not to testify you should not consider that in any way during your deliberations.

The government has the burden of proving a defendant guilty beyond a reasonable doubt and if it fails to do so you must acquit the defendant. Thus, while the government's burden of proof is a strict or heavy one, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is required that the government's proof exclude any reasonable doubt concerning defendant's guilt.

A reasonable doubt is a real doubt based upon reason and common sense after a careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely on it, act upon it without hesitation in the most important of your own affairs. If you are convinced the defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so. You will, of course, say so in the verdict you render at the end of the case.

Now you've seen us at sidebars over here already. What we are doing there is going over questions of law or matters of scheduling and that's my department. You are being [Tr. 83] deliberately being excluded; whenever I push that awful little noisemaker down you know you are being left out and that's so we don't have to send you out of the courtroom. At the end of the case we shall be left out. There won't be anybody in the jury room but you and that's because you are the judges of the facts.

Now I want you to look around the courtroom, folks. There are no cameras in here.

You're not going to see yourself on the evening news.

This is not CNN or the kind of trial that they would be interested in like the William Kennedy Smith trial. I guess they covered the one in Gainesville and the one up in Providence or New Bedford or whatever it was. There was one recently. I'm sure they would have covered Kathy Willetts if she had gone to trial. However, it is not that kind of case and federal court doesn't have cameras in the courtroom.

There is a camera up there but it is for specialized use where a defendant in a criminal case is unable to be present and that way they can monitor the proceedings even though they are not in the courtroom. And that's only been used one time in the years since this building has been built.

Now I need to tell you one more thing. My court reporter is over here and he takes down everything that happens here on

his stenotype machine. The problem is it is [Tr. 84] not for use of the jury. It is only for the use of the Court of Appeals if the case would ever get that far. And some day you will go back there with, you will have a VCR machine in your jury room and you'll have the VCR tapes or VHS or whatever and play it back if you want to hear whatever witness "A" said about "X" or "Y" or "Z". If you have a dispute as to what occurred or what was said in the trial you're going to have to resolve it by the use of your collective memory.

It will be very nice when they have things on VCR and you can play it back and resolve those conflicts. But we don't have that advantage now. So you'll have to be alert, attentive and use your collective memory. Don't feel terribly put upon. Jurors have been doing that for at least ten centuries and you can, too.

So, with that, let's see if we can have opening statements by the lawyers.

* * * *

EXCERPTS OF OPENING STATEMENT OF DEFENDANT

[Tr. 92] MR. SALANTRIE: Did the government take any fingerprints? We have to wait and see. Did they provide you any evidence of that? Certainly clear, concise and conclusive evidence could have been established one way or the other but that was not done.

I submit, ladies and gentlemen, that as a result of [Tr. 93] the government's inability to establish the most important element of this whole case, knowledge, actual knowledge, and as a result of their failure -- BSO agents actually -- failure to obtain any conclusive evidence of knowledge, to wit: actual fingerprints, that there exists a doubt, a reasonable doubt as to that element. And if there exists a reasonable doubt you must say so, find Mr. Rogers not guilty.

* * * *

SIDEBAR COLLOQUY

[Tr. 102] MR. SALANTRIE: Judge, as I mentioned in my opening, very simply, there's no knowledge. His position is he did not know, did not know how they got there.

* * * *

CROSS-EXAMINATION OF MAHMOUD MASHNOUK

* * * *

[Tr. 153] BY MR. SALANTRIE: Now you testified briefly regarding your observations of [Tr. 154] the truck that Mr. Rogers was driving prior to you pulling it over, correct?
A Yes, sir.
Q And at some point in time you turned on your siren.
A Yes, sir.
Q And Mr. Rogers pulled into his carport?
A Yes, sir.
Q And his vehicle was parked completely on his property, right, in the driveway, in the carport?
A In the driveway, yes, sir.
Q It was legally parked, right?
A In a slanted way, yes, sir.
Q But on his own property.
A Yes, sir.
Q You can park any way you want on your own property.
A Absolutely.
Q You pulled behind him, correct?
A Yes, sir. On an angle.
Q Now you testified that you made certain observations regarding a suspected DUI, right?

A Yes, sir.
Q Would it be fair to say that you became a Broward Sheriff's deputy approximately one month prior to the arrest of Mr. Rogers?
A Yes, sir.
[Tr. 155] Q It would be also an accurate statement that Mr. Rogers was your first ever DUI arrest.
A That I made myself, yes, sir.
Q And that would be the first time that you administered roadside sobriety tests to an actual arrestee.
A I think so, yes, sir.
Q And you testified that you administered some roadside tests, alphabet, touch the nose, toe-to-toe, right?
A Yes, sir.
Q Without going into any detail about those, wouldn't it be an accurate statement that your opinion that he failed the test is just your opinion, it's a subjective opinion on your part?
A Yes and no. I was with a field training officer who was a very experienced deputy.
Q I'm going to ask you what your opinion was.
A My opinion was that he was intoxicated.
Q Right. And that's your subjective opinion based upon your observations, right?
A Yes, sir.
Q Would it be a fair statement that you observed slurred speech?
A Yes, sir.
Q Would that be very slurred or slightly slurred?
A Right now I don't remember how. I mean it was slurred.
[Tr. 156] Q You don't remember.
A No, sir.
Q And did you observe an odor of alcohol?
A Yes, sir.
Q Did you observe bloodshot eyes?
A Yes, sir.

Q And as a result of that you arrested Mr. Rogers for DUI.
A Plus the traffic patterns of his driving.
Q He had some traffic tickets, right?
A Yes, sir.
Q And you arrested him for DUI.
A Yes, sir.
Q And he was charged and tried on that DUI charge, right?
A Yes, sir.
Q You testified at that trial?
A Yes, sir.
Q And the jury found him not guilty of DUI, correct?
A Yes, sir.
Q And that was a jury trial, right?
A Yes, sir.
Q And after your arrest on the DUI you conducted a search as you explained, right?
A Yes, sir.
Q And you located the one small .22 caliber in the front right --
[Tr. 157] A Left pocket, sir.
Q -- left pocket and you observed the other .380 under the hat, right?
A Yes, sir, on the seat next to him.
Q They're not automatic weapons?
A No, sir, they're not.
Q And in and of themselves a citizen can possess those weapons legally, correct?
A Yes, sir. There is some speculation who can in regard to felony charges, but, yeah, anybody can possess them.
Q Generally a citizen can possess those.
A Yes, sir.
Q And as a result of your finding those two guns you additionally charged Mr. Rogers with carrying a concealed firearm as to those two guns, correct?
A Yes, sir.

Q The Baretta and the .22 caliber Freedom Arms, right?
A Yes, sir.
Q And you also charged him with resisting arrest.
A Without violence.
Q By stepping back?
A By saying, "No way," and pushing back.
Q He didn't push you, though, did he?
A He just broke loose of me.
Q He stepped back.
[Tr. 158] A Yes, sir.
Q And as a result of that you immediately jumped on him and arrested him, right, handcuffed him?
A Yes, sir.
Q You never made any effort to explain to him why he was being placed under arrest, did you?
A Yes, sir, I did. I advised him he was being placed under arrest for DUI.
Q And didn't he, in fact, say, "Hold on just a minute"?
A He said something, "No way," or something like that.
Q It wasn't, "Hold on just a minute"?
A I don't believe so. I think he said, "No way."
Q You're not sure about that?
A No, sir. I believe it was, "no way."
Q Anyway, he was charged additionally with resisting without violence which is a misdemeanor, right?
A Yes, sir.
Q And two counts of carrying concealed firearm.
A Yes, sir.
Q And there was a trial.
A Yes, sir.
Q And there was a jury trial, correct?
MR. BARDFELD: I object, Your Honor. Relevance.
THE COURT: Sustained.
[Tr. 159] BY MR. SALANTRIE:
Q He was in fact acquitted of those charges, though, right?

MR. BARDFELD: Objection. Relevance.

THE COURT: It's repetitive. Sustained.

MR. BARDFELD: May we approach, Your Honor, sidebar?

THE COURT: I don't see any reason to.

MR. SALANTRIE: Judge, we had an agreement.

THE COURT: Very well. I'm not privy to everything, folks. I have to find out now.

MR. SALANTRIE: We can advise you very briefly.

THE COURT: Very well.

[Proceedings at sidebar:]

MR. BARDFELD: Your Honor, before this trial began we were talking about relevance, about certain items of evidence including the state court charges. I told Mr. Salantrie the government would be willing to stipulate that there was an acquittal for the DUI and things like that, but I just don't -- and we are still willing to stipulate to it but I don't think he should be able to go and ask this witness, you know, what happened in the state court action. I will stipulate that he was tried in the state court and he was [Tr. 160] acquitted.

MR. SALANTRIE: I will just ask him the one question then and be done with it, if I could do that.

THE COURT: Very well.

I can't compel anybody to accept a stipulation, an offer of stipulation, but I have some trouble about the relevance of the thing. Anyway, go ahead if you've got one question.

Let's go.

[Proceedings in open court:]

BY MR. SALANTRIE:

Q Deputy, let me just ask you one question.

A Yes, sir.

Q You charged Mr. Rogers with DUI, resisting arrest and two counts of concealed firearm, right?

A Yes, sir.

Q And he was found not guilty by a jury of all those counts, correct?

A Yes, sir.

* * * *

DIRECT EXAMINATION OF RICHARD CRAZE

* * * *

[Tr. 176] BY MR. BARDFELD: Q Now directing your attention to Government's Exhibit No. 5. What is Government's Exhibit No. 5?

A Government's Exhibit No. 5 is a firearms silencer, a particular type of firearms silencer called a Sionics-type, Sionics being a manufacturer of firearms silencers in the early '70s. This is a copy of one of those. It is devoid of the manufacturer's marks of identification, does not have a serial number and it is comprised of two outer cylinder sections, a ported sleeve, eyelets packed around the sleeve, a threaded bushing, a baffle, spirals and a component known as an encapsulator and then a front end cap assembly.

Q Does Government's Exhibit No. 5 fit onto Government's Exhibit No. 2?

A Yes, it does. It threads onto the barrel.

Q How does a silencer actually work?

A When a firearm is discharged a silencer, once it's attached to the firearm, will allow the projectile or the bullet to pass through the device but at the same time it will trap the very rapidly expanding burning gunpowder, and that's the noise that we associate with the gun being fired when it's fired. The loud bang that you hear is the very rapidly expanding gases as they enter into the atmosphere from the barrel. If you provide a means to trap that or slowly retard [Tr. 177] the release of that then you will lessen the noise that the firearm will make.

Q Do silencers completely silence a firearm?
A No, they do not.
Q Why don't they?
A Because there's a number of noises generated when a firearm is fired. There's mechanical noises, there's noise produced by the air being pushed forward by the projectile. All of these are overshadowed by the loud bang that we hear. It's similar to an automobile with a muffler on and a muffler off or defective muffler.
Q Did you have the opportunity to examine Government's Exhibit No. 5?
A Yes.
Q And how did you conduct your examination of Government's Exhibit No. 5?
A Again, a physical examination to identify its componentry and then subsequent test firing of the silencer with and without the silencer being attached to the firearm.
Q How many silencers have you examined or tested?
A I would estimate over two thousand.
Q What were the results of your tests in this particular instance?
A May I refer to a copy of my report?
THE COURT: Please proceed.
[Tr. 178] THE WITNESS: Government's Exhibit 2 was test fired five times without Government's Exhibit 5 attached. Each one of those sound levels were recorded and then an average taken.
BY MR. BARDFELD:
Q Okay. So in other words, you test-fired the machinegun without the silencer?
A That's correct. That was tested first. And that averaged 153.7 decibels. And then Government's Exhibit 5 was attached, the weapon fired five more times. Each time that sound level was recorded and then an average taken. With the silencer

attached it registered 132 decibels giving you a decibel reduction of 21.7 decibels.
Q Is that a significant reduction in sound?
A It's very significant.
Q Can you explain the extent of the significance or the difference?
A It's nearly a hundred percent of the effective sound.
When we are talking about sound reduction we are talking a logarithmic progression or digression.
So if we start with a known figure, reduce the decibels -- reduce the sound levels from 10 decibels, you've reduced the intensity 10 times; 20 decibels a hundred times; 30 decibels a thousand times. So it's very significant.
Q In this particular case you examined Government's Exhibit No. 5. Can you identify Government's Exhibit No. 5, [Tr. 179] is there anything to identify it?
A There are two items, one of which is attached to the device. It's an evidence tag that bears my signature with the date 3/25/91. In addition to that at the rear I've scratched in my initials R.C.
Q And why did you scratch in your initials?
A Because of the absence of the manufacturer's identification or a serial number.
Q So you test-fired this with and without the silencer, is that correct?
A Yes, sir.
Q Did you notice with your own ears a difference in sound?
A Yes, I did.
Q Do you have an opinion as to what Government's Exhibit No. 5 is?
A Yes, sir, I do.
Q And what is that opinion?
A That it is a firearm silencer as defined within the Federal firearms statutes.

* * * *

DIRECT EXAMINATION OF DALE ARMSTRONG

* * * *

[Tr. 195] BY MR. BARDFELD: Mr. Armstrong, just focusing your attention again back to March 15th, 1991, you had been out to District 8, is that right?

A That's correct.

A And you were about to interview the defendant George Rogers, is that right?

A That's correct.

Q Can you identify George Rogers, the person that you interviewed that particular night?

A Yes. He's seated right here in the short sleeved shirt, white with checks on it.

Q Wearing glasses and having a mustache?

A Wearing glasses with a mustache.

MR. SALANTRIE: I will stipulate this is George Rogers seated next to me.

THE COURT: Very well.

BY MR. BARDFELD:

Q And on March 15th you did interview George Rogers?

A Yes.

Q Did you tape record that interview?

[Tr. 196] A Yes, at his request.

Q I show you now what's been marked as Government's Exhibits 12-A and 12-B; can you identify those exhibits?

A Yes, I can.

Q What are they?

A They are two copies, two redacted versions of the original tape recorded conversation made on that evening.

Q Have you had an opportunity to listen to Government's Exhibit 12-A and 12-B?

A Yes.

Q Do Government's Exhibits 12-A and 12-B accurately depict the conversation on March 15th, 1991 as you remember it with the exception of those redacted portions?

A Yes.

MR. BARDFELD: At this time I would move for the admission of Government Exhibits 12-A and 12-B into evidence.

MR. SALANTRIE: No objection from the defense.

THE COURT: Very well. Received. The tape is received in evidence only the tape.

[Government's Exhibit No. 12-A and 12-B were received into Evidence.]

BY MR. BARDFELD:

Q I now show you what is marked Government's Exhibit 12-C; can you identify that?

A That is the transcript with redacted portions of the [Tr. 197] conversation.

Q Have you had the opportunity to review that transcript while listening to the redacted tapes?

A Yes.

Q And does that transcript accurately depict the interview as you remember it on March 15th, 1991 with the exception of the redactions?

A Yes.

MR. BARDFELD: Your Honor, may I publish Government's Exhibits 12-A and 12-B to the jury and play the tape for them?

THE COURT: Play the tape because it's in evidence. The transcripts --

MR. BARDFELD: May I also pass out --

THE COURT: You may distribute it to the jury - but again, folks, I want to remind you it's the tape that's evidence, not the transcript. So if you find a discrepancy between what

you are hearing and what you are reading disregard what you are reading. Concentrate on what you are hearing.

BY MR. BARDFELD:

Q Before I get to playing the tape I do have a couple of questions: Who was at the interview?

A Myself, Drug Enforcement Special Agent Joe Kilmer, Broward County Sheriff's Office Detective Bob Faulkner and [Tr. 198] several other Broward sheriff's deputies from that district.

Q And anyone else?

A And George Rogers.

MR. BARDFELD: Your Honor, if I have a question about the tape should we stop the tape?

THE COURT: Pardon?

MR. BARDFELD: Should I stop the tape when I have specific questions about it or should I --

THE COURT: Sure.

MR. BARDFELD: -- let it play through the whole time?

THE COURT: Sure.

MR. BARDFELD: May I play the tape?

THE COURT: Please. Proceed.

BY MR. BARDFELD;

Q Do you have a copy of the transcript with you?

A Yes.

TRANSCRIPT OF AUDIOTAPED POST-ARREST INTERVIEW

[Tape played as follows:]

DA: Okay, the time is 3:15 a.m. or 3:22 a.m, the date is 3/15. The following conversation is between George Rogers and Dale Armstrong with ATF, Joe Kilmer with DEA and Bob Faulkner from Broward County Sheriff's Office and witnessed by three other Broward County Sheriff's officers.

The Statement of Rights:

[Tr. 199] Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in court or other proceedings. You have the right to consult an attorney before making any statement or answering any question and you may have him present with you during questioning. You may have an attorney appointed by the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent. And you may answer questions or make a statement without consulting a lawyer, if you so desire.

GR: Okay.

DA: George, the officers that arrested you told me that in the pick-up you were driving were all, were all these items. Now, you're saying some are yours and some aren't yours.

GR: Yes, sir.

[Tr. 200] DA: Okay, which ones are yours? Is this one yours?

GR: Yes, sir.

DA: Okay, the -- George is pointing to a .22 Magnum Freedom Arms --

BY MR. BARDFELD:

Q Which particular exhibit up there is the transcript referred to at that time? Do you have it?

Sorry about that. We didn't bring everything that was introduced up.

A He's referring to this. It's a -- All these guns are safe, by the way, they've got clips in them; they're safe right now -- This is the .22 Magnum Freedom Arms four shot miniature revolver he's referring to.

Q That is Exhibit No. 1 -- Exhibit No. 7? I'm sorry.

A Exhibit 7.
Q Exhibit 7. Okay.
[Tape continues:]
.. four shot miniature revolver, serial number 817914. And this one?
GR: Yes, sir.
DA: Okay, George is --
BY MR. BARDFELD:
Q Which one is he referring to now in the interview?
A The Baretta .380 caliber semi-automatic pistol.
Q And what is the exhibit on that one?
[Tr. 201] A Exhibit 9.
[Tape continues:]
... pointing to a Baretta .380 caliber semi-automatic pistol, serial number A46113Y. Anything else over here?
GR: I don't know anything about those things.
DA: Okay.
GR: And I definitely know what they are.
DA: You do.
GR: Yes sir.
DA: Okay, what are they?
GR: One is a, that is a .380, I think a MAC.
BY MR. BARDFELD:
Q Which one was he referring to at that time?
A He's referring to the .380 MAC-11 semi-automatic pistol.
Q Government Exhibit?
A Government Exhibit 2.
[Tape continues:]
DA: Okay.
GR: And the other is a, that is a silencer.
THE WITNESS: He's referring to the silencer, Government's Exhibit 5.
[Tape continues:]
DA: Okay.
GR: That is a suppressor.

[Tr. 202] THE WITNESS: He's referring to the suppressor here and that is Government's Exhibit 6.
DA: All right.
GR: I don't know what that is.
DA: Okay.
GR: I think that is a magazine feed.
THE WITNESS: That's also part of Government's Exhibit 6. It is a magazine feed that just pushes bullets into a magazine faster than you can do it by hand.
[Tape continues:]
DA: Okay.
GR: And that's magazines.
DA: Okay, but you don't know whose these are or whether or not they're yours?
GR: No, sir, they are not.
DA: Okay, do you know how they got in your, in your pick-up?
GR: No, sir.
DA: No?
GR: I don't even know where they were.
DA: Okay.
GR: That is my tool case right there.
DA: That is your tool case, the black tool case?
GR: Yes, sir.
BY MR. BARDFELD:
Q And, which tool case?
[Tr. 203] A He's referring to Government's 1, the black tool case.
[Tape continues:]
DA: Right.
GR: Now, that was searched.
DA: Right.
GR: Less than a month ago by the Broward County Sheriff's Department.
DA: Okay, the tool case was.

GR: Yes, sir.
A: Okay.
Do you own a 10 mm?
GR: Yes, sir.
DA: A Colt 10 mm.?
GR: Yes, sir, I do.
DA: Okay, that where these two clips come from?
THE WITNESS: He's referring to these clips that are Government's Exhibit 13, two clips to a Colt 10 mm. pistol.
[Tape continues:]
GR: Yes, sir.
DA: Okay.
JK: Where would that gun be at this time?
GR: That's at my home.
DA: Okay, did you buy those guns yourself?
GR: Yes, sir.
[Tr. 204] DA: Okay, so if I trace them they'll come back probably to you buying them on -- Did you fill out a 4473?
GR: Yes, sir, I did.
DA: A yellow form, okay, and they'll come back to you.
GR: Yes, sir.
DA: Okay, but, you have no idea whose these --
GR: I've never seen them in my life, sir.
DA: Okay.
GR: I have a lot of weapons, I, I'll not deny that, but I do not go with bullshit like that.
DA: Okay.
GR: That case was in my truck.
DA: Right.
GR: Ah.
DA: The black tool case.
GR: And I don't want no part of that bullshit; I don't deal in automatics.
DA: Okay.

GR: If you want to ask me how to make a silencer, I'll tell ya. You get, you get a god damn oil filter, that's the best silencer you can get. Don't they teach you that in, in, in Special Forces? That's what they taught me.
DA: Yeah.
GR: All right. Don't, don't, don't hang that bullshit [Tr. 205] on me. I don't want it, I can't afford, I can't do it.
JK: George, when was the last time you looked in your bag?
GR: I've never looked in the bag since I was arrested, never. It's been in the back of my pick-up truck. I've never had any reason to. I've never had any reason to. We just changed the whole bed in my pick-up truck, and I never looked in that, that tool...the only thing that was in that tool pouch was, was, a set of channel locks, a set, a set of metric tools, metric sockets, standard sockets in a, in a metal case, the ratchets and that's it. That's all that was in there.
DA: Well, where were you coming from tonight when they, when they stopped you?
GR: I had been wrapping rods at Jim's Going Fishing, I'm making myself a rod, I wrap rods.
DA: Okay.
GR: And I had wrapped a rod because it's a very tedious wrap and it's for me.
DA: Uh-huh.
GR: I had, had two or three beers; we had, had a pizza.
DA: Yeah.
GR: I came through Davie, I stopped in Davie at a bar. The crowd was rough ...
[Tr. 206] D : Yeah.
GR: Not for me, got back in my car, came right straight home.
DA: Okay.

GR: They, they said they seen me weaving on Hiatus. If I was weaving it's because that earlier this morning there was a tire.
DA: Right.
GR: In Hiatus, that was, what do you call, had metal in it.
DA: Okay.
GR: And it was still there tonight.
DA: Okay, it was a blow-out and it was in the road.
GR: Yes. My social security is 406-50-4016. I don't know what you want.
DA: Do you know, do you know what these are?
GR: Yes, sir.
DA: What are those?
GR: Those are baffles for a silencer.
THE WITNESS: He's referring to Government's Exhibit 10.
MR. BARDFELD: What is a baffle?
THE WITNESS: Baffle goes in the end of a silencer and they are made out of rubber and there's a little tiny hole in the middle and it traps any gas that would make it through the silencer towards the end and wouldn't be able to escape [Tr. 207] and make a noise and that traps the last bit of gas and they wear out after a while and you need replacement ones. Bullets coming out take pieces off of it.
[Tape continues:]
DA: Okay. Are these, these are new ones?
GR: Yes, sir, they are.
DA: Okay, and what would you do with these?
GR: Put them on end.
DA: Put 'em, exchange them in the, for the other, the old one?
GR: If they were worn out, you would.
DA: Yeah, okay.
GR: I'm not going to lie to you. Those are my bullets right there that he just laid down.
DA: These?

GR: These, those are mine.
THE WITNESS: He's referring to a bag of bullets that one of the deputy sheriffs came over and placed on the table as I was speaking to him.
MR. BARDFELD: What exhibit is that?
THE WITNESS: That is Government's Exhibit 11.
[Tape continues:]
DA: These are, okay.
GR: Those are all .380's.
DA These are .380's?
[Tr. 208] GR: Yes, sir.
DA: Okay.
GR: That belongs to that right there and there should be a magazine to that.
DA: Okay.
GR: Two mag...there should be two magazines for that. That's it. There should be some Hydra Shok.
DA: Right.
GR: And that's my knife right there with my name on it.
DA: Okay.
GR: And I bought this at the gun show with a police officer named Alan Marshall, went to the...went to the show with me. And you can verify that.
DA: Okay.
GR: Officer, I do not deal in that shit down there and anybody they that knows me, you can check twenty years back, they do, they know I do not deal in that bullshit there. I'm scared to death of it.
DA: Okay. They look like the exact same rounds in these clips, though.
GR: Try it.
DA: It's a, it's made by the...the clip to the M-11 and the bag of bullets for your Baretta have the same exact ammunition. The make and the caliber and everything.
GR: They're not mine.

[Tr. 209] DA: Okay. Okay, well, George, do you own any other guns?
GR: Yes, sir.
DA: What do you have?
GR: I have a... a 10 mm. at home.
DA: Right.
GR: Stainless.
DA: Right.
GR: I have a .45, I have a .45, target gun.
DA: A .45 target, okay; is that a Colt, also?
GR: Yes, sir.
DA: Yeah.
GR: I have a Glock.
DA: A Glock.
GR: Yes, sir.
DA: The 9, 9 mm. Glock.
GR: Yes, sir.
JK: Do you have any fully-automatic weapons?
GR: No, sir, I do not, never, ever, never have I ever.
DA: How did you, how did you learn so much about, about silencers?
GR: I studied.
DA: Studied?
GR: Yes, sir.
DA: Okay.
GR: In fact, if you probably go to my house now there's a [Tr. 210] book on silencers.
DA: Okay.
GR: And there's probably all kinds of gun magazines that I read.
DA: Okay, but there wouldn't be any silencers? Or?
GR: No, sir, there would not. No, sir, there would not be.
DA: Okay.
JK: Would there be any other kind of contraband in your house, George?

GR: What do you call contraband?
DA: Well, like, anything that's illegal, any illegal firearms or any illegal drugs or anything like that? You know, narcotics?
GR: No, sir.
DA: No?
GR: Absolutely not, I don't take that, I don't even ...
JK: If we were, if we were to ask you for consent to look in your house.
GR: You absolutely can.
JK: Okay, is there anybody there that would be able to let us in?
GR: Take my keys, you got them.
JK: No, I mean, is there anybody else living at your residence?
GR: No, no, sir.
[Tr. 211] JK: No, just you, that's it?
DA: Do you have any dogs or animals at the house?
GR: No, sir. There's, there's, I, I, has, there's no hesitation, you can go over my house right now.
JK: George, looking at this candidly, okay, this is the problem that myself and Agent Armstrong see that you're in. Okay, you're in your vehicle that's registered to you; you've got a gun on your person --
GR: Yes.
JK: By the way, do you have a permit, a carry permit?
GR: No, I carry that in the store.
JK: Okay.
GR: And I came straight from the store.
JK: Okay. And, okay, you've got this, you've got the small .22 and then the .380...
GR: The .380 was in a package zipped and locked.
DA: Right, okay.
GR: Wasn't it, sir?
DA: Yeah, that's what I believe.

GR: Yes, it was and that one, right?
JK: But also, what you have in your car...
DA: No, it wasn't.
GR: Yes, it was.
DA: It was under a hat.
GR: No, sir, that was in that case right there.
[Tr. 212] JK: Okay, listen. We're not here to argue with.
GR: Yeah, okay.
DA: Yeah, well, we won't even talk about this, then.
GR: Wasn't it, also, wasn't it in that zipped case right there?
BF: That gun was under that hat right there.
JK: This Baretta was under the hat?
BF: Cocked and loaded.
DA: And then this one was in your pocket.
GR: That's, that was in that zippered case.
JK: George, listen, okay?
BF: The small one was in his pocket.
DA: Was this in your pocket, though?
GR: Yes, sir.
DA: It was in your pocket.
GR: I carry that in my pocket in the store at all times.
DA: Okay, okay, but see...
GR: And I, I even went through the gun show with a police officer, with it, the other day; and you can verify that.
JK: The problem you're gonna have...
GR: I'm not a criminal.
JK: No, I know. The problem is that we perceive that you're going to have, okay, is that you're going to go before a judge with a gun in your pocket and one nearby under a hat and also a bag...
[Tr. 213] GR: That was not, that...
JK: George...
GR: That was in that zippered case...
JK: George, just let me finish, okay? I'm just telling what the facts are right now as, as we see them, okay? And

that you have your two guns, one gun with you, on your person, another gun close by under a hat...
GR: But...
JK: In the vehicle that's registered to you you've got a fully-automatic MAC-11 with a silencer.
GA: That is not my weapon.
JK: George.
DA: Okay.
JK: Just listen to what I have to say.
DA: Just listen to him.
JK: I'm not going to say whether it is or isn't; I'm just going to say what the judge is going to hear. Okay, that, that in your vehicle there's plenty of ammunition, a silencer and a fully, MAC-11 machinegun. Okay. Now, just from what we've said, it's my feeling that the judge is going to feel that regardless of what you say, that, that gun was yours.
GR: It is not mine, sir.
JK: Okay, well, I'm sure you can argue that and that's what an attorney's for, but we're here right now to see if [Tr. 214] you may have a change of heart, there may be something you might want to do to help extricate yourself from this situation.
DA: If you know anybody, you know, that's making these...
GR: I have nothing.
DA: Or dealing in these.
GR: You can print that, you can do whatever you want to do. These two weapons are mine.
DA: Uh-huh.
GR: All the police officers that I know can verify that, I carry this gun by the register the .380 the other .22 I carry in my pocket at the store.
DA: Okay.
GR: The knife has got my name on it.
DA: Right.

GR: I make knives.
JK: Okay, we're not really concerned with any of these three, okay, Agent Armstrong is concerned with what's over there.
GR: You...
JK: Because he will tell you that...
GR: Agent Armstrong, call the Sheriff's Department that called me and searched my truck they went through that pack...
DA: Yeah, but that was three weeks ago, right?
[Tr. 215] GR: I have not touched it since.
DA: Okay.
JK: Well, that's all the more reason, okay you're acknowledging that, that pack is owned by you...
GR: Yes, sir.
JK: In your vehicle...
GR: Yes, sir.
JK: Well, how do you think a judge is going to react when he hears that in your vehicle there's a pack that you identify, that a police officer has already seen you within your car, but yet strangely there's a fully automatic weapon and a silencer, both of which are extremely illegal, in your vehicle, but yet you're claiming you have no knowledge of how they got there...
GR: I have no knowledge, none.
JK: Don't you think that's going to strike a judge as kind of odd?
GR: I have no idea. Why didn't they find it three weeks ago? In the same pack?
JK: Well, I guess the logical person would say that it probably wasn't there three weeks ago.
GR: It was three weeks ago, and they can say, they will verify it. Because they opened it.
DA: The pack was.
JK: Maybe the pack was.

[Tr. 216] GR: It was opened three weeks ago.
DA: Okay.
JK: But it didn't include the weapons at the time.
GR: And I have no idea where they came from now.
DA: Okay, George. George, you ride with anyone, you ride with any, any clubs in the area?
GR: What do you mean?
DA: You ride Harleys or anything?
GR: Oh, no, no. I'm thinking of buying a police bike from one of the officers.
DA: Yeah, what was the bar you were at tonight, earlier tonight, do you remember? You came to, after you ate pizza you went to a bar for awhile.
GR: No, I didn't go for a while. I went in and I...
DA: You didn't like the crowd?
GR: I didn't have any money.
DA: Okay.
GR: I checked out my wallet and I didn't have any money so I left.
DA: Okay, do you remember the name?
GR: It was the one in the middle of Davie, that's the only...
DA: Okay.
GR: I think some guy bought me a drink and I, I said the hell with this, I don't have any money, I'm going home.
[Tr. 217] JK: Okay.
GR: That was it.
DA: All right. Well, George, I don't know what else I can say to you. You're willing to give us a consent to search your house.
GR: Yes, sir, right now.
DA: Okay, Bob...
GR: And I'll tell you what you're going to find. You're going to find my, my Glock...
DA: Uh-huh.
GR: Underneath the pillow...

DA: Uh-huh.
GR: And, you're going to find two magazines on the nightstand, and that's it.
DA: Okay, and a, and a book on silencers or something like that.
GR: There's a book, I think, unless I packed it away. I don't know.
DA: Okay.
GR: Some screwball book I bought at a gun show.
DA: Okay, anything...
GR: But it's nothing we weren't taught.
DA: Okay.
GR: You know, you want a silencer, you, you, you get a, what's the best silencer?
[Tr. 218] DA: Sionics.
GR: No, it's, it's a two liter bottle. I mean everybody knows that, I mean this...
DA: A two liter Coke bottle you're telling me...
GR: Yeah, this bullshit is not mine. That's not mine.
JK: George, like I said, we're not here to try to, upset you or intimidate you, anything.
GR: I am upset.
JK: Okay, well, let's...
GR: I don't deal in this.
JR: Well, just listen to what I have to say, okay. All I'm saying is there are some very, you know, Agent Armstrong will tell you what the minimum mandatory jail sentences are...
GR: You don't have to; I know.
JK: And the case against you right now is pretty strong. Okay, you have two police officers who stopped you for DWI and this is what they find, okay?
GR: I wasn't drunk.
JK: We're, well, I'm not going to debate that. I'm simply saying they had a reason to stop you. They had a reason

to arrest you and this is what they find. And Agent Armstrong is just here to see if you may want to cooperate with the government. If, if your stance is that you do not know how this stuff got there.
[Tr. 219] GR: Absolutely not.
JK: Then that's fine. But you should understand that you're facing a minimum mandatory Federal jail sentence.
GR: These are my two weapons and my two magazines.
JK: Okay, we're not worried about those.
GR: This is my knife, that's the only thing I know about.
JK: Okay.
DA: By two weapons, you're referring to the .22 and the .380 Baretta.
GR: Yes, sir.
A: Okay. I just want to make sure you don't, you don't mix your stuff or start claiming over here. Bob, you want to ask George anything?
BF: What's your middle name, George?
GR: Glenn.
BF: Do you have a phone at home?
GR: Yes, sir.
BF: What's the phone number there?
GR: 474 -- Oh, God.
DA: You all right?
GR: I just got very dizzy.
DA: Oh, okay.
GR: -- 1975.
BF: What's your phone at work?
GR: 963-2499
[Tr. 220] BF: Do you ever go over J & S Lounge?
GR: No.
BF: You have a nickname, George?
GR: Sonny. That was way back when I was a kid going through school.
DA: You know Stanley Mumford?

GR: No, sir.
BF: How much do you weigh, George?
GR: Oh, about 200, probably, now.
BF: Yeah, you got to lay off the Budweisers.
GR: I don't drink?
BF: No?
GR: No, I can't drink anything.
BF: You got any tattoos, George?
GR: No, sir.
BF: Scars?
GR: I have a scar on my right ankle.
BF: So, you don't own a bike, right?
GR: No, I do but it's, I have a Suzuki that is, hasn't been, hasn't run in years. It's sitting on the porch. If I lie to you, you can go and see it.
BF: You know Parts Pete?
GR: No.
BF: It's on your porch?
GR: I've had it for years. It's just sitting there. In [Tr. 221] 1981 I got it.
BF: How long you lived here in South Florida?
GR: Since 19678. I got shot four times in 'Nam and I can't take the cold weather.
BF: I never got shot in 'Nam and I can't take the cold weather.
GR: Was you there in 'Nam?
BF: No, Korea; I'm older than you.
GR: No.
BF: No, you're born in the same year I was.
DA: That's it? Well, I got nothing else to, to ask you, George. These gentlemen will probably want to be taking you tonight.
GR: Am I gonna get these back?
DA: Well, well, George, they're going to be retained as evidence right now.

JK: You're probably going to jail.
DA: Okay, they are going to be retained.
GR: Print those there, there's no prints of mine on them.
DA: Okay, we're going to.
GR: There's no prints. Because I want to tell you something, because that case was in my truck--

BY MR. BARDFELD:

Q That case, again we are referring to Exhibit No. 1, the black canvas bag?
[Tr. 222] A Yes, Exhibit 1, the black canvas bag, he refers to as a tool bag.

[Tape continues:]

-- and it's been there ever since.
JK: Well, that's a given right now. If there comes a time when your mind gets a little clearer, okay, then you might want to call Detective Faulkner or Agent Armstrong 'cause you really are in a lot of trouble.
BF: Where were you born?
GR: Newport, Kentucky.
BF: Newburke?
GR: Newport. How can I be in trouble when that doesn't belong to me?
JK: I think a judge is going to see it, otherwise. Well, I guess that's why you will get an attorney, but the evidence ...
GR: What happens if I don't have the money for an attorney?
DA: They'll give you one. That's when I read you your rights. When I read yours I said you'd get an attorney appointed by the Court.
GR: What happens to a slob like me when the law goes against them?
JK: What are the minimum mandatories on this?
GR: You just yo-yo right, you just be one of the guys against the poor slob like me, right. [Tr. 223] I know the law,

I sold guns. I know what this is and it don't belong to me and that shit.

DA: Okay, just calm down, George. All right. We're gonna check into it.

GR: I never dealt in that, I never bought any of it. I never done that shit, I could make silencers, for Christ's sake, I could do, I could do anything. But I never, ever, ever did that, never, never.

DA: All right, George, just calm down.

BF: What's your Social Security number?

DA: 406-50-4016.

BF: Little slower.

DA: Just calm down.

GR: 406-50-4016. If you check my fucking military records, you know, I know all about this bullshit. You can check back from 1973 when I worked at Bob X. I never even liked this shit. It was always trouble. I've never been in this bullshit, never, never, never.

DA: All right, George, just calm down. We're not going to talk about these any more. If we give you a consent, a consent to search form, will you sign that giving us consent to go search your house?

GR: Yes, sir.

DA: Okay, without reservation?

GR: There's nothing in my house.

[Tr. 224] DA: Okay, so you don't mind if we go look in it?

GR: No, sir, none.

JK: You have the right to refuse that.

GR: There's nothing there. I don't have nothing to hide.

JK: Okay.

DA: Okay, George. We're not here to pick on you or anything like that. We're just here to find out what's going on. That's all.

GR: You call the Sheriff. You locate the Sheriff that seen that pack in my truck and she will tell you that pack had tools in it.

DA: Okay. Well, we're gonna do that, George, don't worry. Don't worry about it.

GR: Oh, oh, oh, don't worry about it. I'm looking at twenty fucking years right here. I know what this is.

DA: How do you know that's twenty years?

GR: Silencers, and you said that was a full automatic. That's twenty years.

DA: I know. You're right.

GR: That, I put that on there myself; that's not against the law, is it?

DA: No.

GR: No, it's not.

DA: That's just a little flash suppressor.

[Tr. 225] GR: I was gonna, no, I was gonna, I was going to do that to the .380, sir, or the 92, so the officers could put that in there. I even have an invention that a police officer can put a chip in his finger and there would be a servo in the, in the gun and only a police officer could fire the weapon. Colt wants it so bad.

JK: How would you get a chip inside your finger?

GR: Cut it, put a chip, about as big as a head of a pin.

JK: Robo-cop.

GR: No, no, no, it's not, it's very simple. All you have to have is a memory on the trigger.

BF: Like a key in the ignition.

GR: Yeah. If it, if it's, you have the sensor in the trigger, you can have a chip in the finger that has a servo in the grips that blocks the trigger. And only, and when that, when you put your finger against it, it throws it back. Anybody else puts it there, it won't work.

BF: So, you don't know Parts Pete, huh? Never heard of him?

GR: Never heard of him, never heard of him.
DA: Give us your address, George, Lot 380.
GR: 10550.
DA: Yeah.
GR: West State Road 84, Lot 380.
DA: And that's in, in Davie?
[Tr. 226] GR: Well, it's unincorporated.
DA: Okay.
GR: Oh, God.
DA: All right, why don't you read this. This is the consent form.
GR: I can't, I don't have my glasses.
DA: Do you want me to read it to you?
GR: Yes.
DA: Okay. "I, George E. Rogers" --
GR: George G.
DA: George G. Rogers, okay.
-- "George G. Rogers, having been informed of my constitutional right not to have a search made of my premises, hereinafter mentioned, without a search warrant, and of my right to refuse to consent such a search, hereby authorize Dale Armstrong of ATF" -- that's me--"Joe Kilmer of DEA, Bob Faulkner of the Broward Sheriff's Office and other deputy sheriffs of the Broward County Sheriff's Office in Ft. Lauderdale, Florida, to conduct a complete search of my residence and/or vehicle located at 10550 W. State Road 84, Lot 380."
[Tr. 227] And you say it's in Davie or is it Fort Lauderdale?
GR: Unincorporated Fort Lauderdale.
DA: Unincorporated Fort Lauderdale, Florida. Okay.
"These Deputy Sheriffs are authorized by me to take from my residence any letters, papers, materials or other property which they may desire" -- which we may need

to retain as evidence. "This written permission is being given by me to the above names of the Deputy Sheriffs and other agencies voluntarily and without threats or promises of any kind." Is that okay?
GR: That's fine.
DA: Okay. Sign right there and then we're going to sign in the witness, the witness blocks.
GR: Who's gonna be there while you're doing the search?
DA: The three of us and them.
GR: Can I have, can I have somebody there while you're there?
BF: Sure.
DA: Yeah.
GR: When are you going?
DA: We're gonna go right now.
GR: Okay, let's, let's wait and somebody else there before [Tr. 228] you get there or while you're there.
DA: Okay. Who else? Who else do you want?
GR: I want ...
DA: Another Deputy or ...
GR: No, no, no, no. I want, I want anybody to walk in with you so you won't plant something like that.
JK: Do you want to be there?
GR: Yes, oh, I'd love to be there.
DA: Okay.
JK: 'Cause getting somebody up at 4:00 in the morning could be a little tough, okay?
GR: Oh, God, please, if you handcuff me, don't handcuff 'em so tight. My hand is swollen so bad. I'm not going to go anywhere. I have nothing to hide.
DA: Okay, George, we're gonna ...
GR: Can I go with you ...
DA: You're going with us.
GR: You're damn right I'm going to go. I have nothing to hide.

DA: Okay.
GR: Right there? Right there, just sign right there?
JK: And then date it. It's now March 15th at 4:00 a.m.
GR: With this pen?
DA: Yeah, just write 3/15/91 on there.
[Tr. 229] GR: Three?
DA: 3/15/91 and that's the date.
BF: George, you got a little mini-storage shed?
GR: Yes, sir.
BF: What do you got in there, just personal stuff?
GR: I have rod building equipment, tools, tires. You're welcome ...
BF: Just stuff.
GR: You're welcome to look in it.
BF: Just stuff that you don't have room for at home?
GR: Sir, I have nothing to hide.
DA: We believe you.
GR: I have nothing. I swear to my Christ above, I have nothing and I'm scared to death. I know you guys and I'm scared of you.
DA: Well, there's no reason to be, George.
GR: Bullshit.
JK: We're gonna, they will.
DA: We will, we can do that.
JK: When you say stopped, was that when you got arrested for DWI a month ago?
GR: Yes, sir.
JK: Okay.
GR: She went through that, because that pack was moved, that pack was went through, my tools was in it and I have not [Tr. 230] moved it since.
JK: You have other people that usually drive your vehicle?
GR: No, sir.
JK: You're the only one ...
GR: Yes, sir.

JK: That has the keys to it?
GR: No, well, I'm the only one that has the keys to it, yes. So, you're the only one who really exercises control over that ... Yes, sir.
JK: Truck.
GR: And nobody has driven that truck since.
JK: Okay.
GR: And we have had the bed off of it, we have put a, diamond plate bed on it.
JK: I believe you, no problem.
DA: Okay.
JK: We understand where you're coming from.
BF: Let's go take a peek.
DA: Yeah, we're gonna go by your house. Stay right there while we get some handcuffs. Okay, I'm gonna turn off the tape recorder and we won't talk to you any more. We'll take you out there and any time we're gonna talk to you we'll turn the tape recorder on.
GR: You don't have to do that.
DA: You don't mind?
[Tr. 231] GR: No, sir.
DA: Okay.
GR: I have nothing to hide.
DA: Okay, well, you just wanted it on before so ...
GR: To make a statement that, that, that does not belong to me. The two guns right there and my knife and these two 10 mm. magazines ...
DA: Okay.
GR: And these magazines ... belong to me.
DA: But, but you don't own that, that ...
GR: No, sir, I've never seen that.
DA: Okay, okay. I'm gonna end this tape. The time is now 4:07 on 3/15/91. It's Friday morning and we're on our way to George's house to see, to see what's there and, good night.

* * * *

CONTINUED DIRECT EXAMINATION OF DALE ARMSTRONG

* * * *

[Tr. 235] Q. Did you send the firearms, Government's Exhibit 2 and Government's Exhibit 5, to Washington for analysis?

A. Yes.

Q. Did you also send them for fingerprint analysis?

A. No.

Q. Why not?

A. Well, for several reasons: first, initially, after I arrived at the scene about 1:30, the firearms were out on a table and the deputies had already pretty well handled them, handling the firearms, and that's not too good for fingerprint [Tr. 236] preservation.

Q. Why is that?

A. Well, when you handle it, you're just putting your fingerprints on top of the ones that were there and wiping those out or smearing them or smudging them.

Secondly, as you can see, this silencer has a cloth sheath over it. You're not going to have any fingerprints on it underneath. The person who put the cloth sheath on there wiped off any prints that were going to be on there when they put the sheath on there.

Additionally, if I was to remove this to try and have it fingerprints, it's just going to wipe off any fingerprints that happened to be saved, they'll be gone.

This end, you will see, is a porous surface, it is not a smooth surface, the very end here, and you aren't going to be able to get prints off of that and the chances of someone putting

their hands down there to screw it on anyways -- because that's the end that goes on the gun -- is highly unlikely.

This weapon is what they call a Parkerized finish. It has, opposed to the Baretta which is a smooth black finish, a satin black matte or other firearms are in a blue or stainless finish. Those maintain fingerprints very well and you have good results getting fingerprints off them. Parkerized finish you can tell just by looking at it and feeling it, is not a [Tr. 237] smooth, glossy finish, it doesn't hold fingerprints well, and after the deputies handled it and with this type of finish, it's ridiculous to even try.

And the third reason, of course, being our lab is overloaded and I'm not going to send them something like this when it's in somebody's vehicle registered to them and they tell me there right in the interview they are the only ones who have exercised control over their vehicle.

* * * *

PRELIMINARY CHARGE CONFERENCE

[Tr. 240] THE COURT: Anybody who has any instructions other than pattern instructions?

MR. SALANTRIE: Yes, Your Honor. I prepared three and presented them to your clerk, law clerk. I provided them to Mr. BARDFELD also.

THE COURT: Well, this one about constructive [Tr. 241] possession is almost the same as the standard possession instruction that was given in this Circuit and previously in the Fifth Circuit; although, frankly, the juries do not understand that possession instruction. I have discussed it with enough of them to know that.

MR. SALANTRIE: Judge, there is one --

THE COURT: I haven't a better one, unfortunately. Well, there is one out of one of the circuits that I think is a little clearer.

MR. SALANTRIE: May I address that for one second? The only addition, Your Honor, is that I put in the word "knowingly" which, in fact, reflects what the law is and is cited or stated in U.S. vs. Daniels, 527 F2d 1147.

THE COURT: Well, you can't underline it under any circumstances.

MR. SALANTRIE: Oh, I understand that, Judge. I just did it for emphasis for you. If it's underlined, in the actual instruction, I have no problem if that is deleted, the underlining. I believe it is the law and also it is the defense, our defense.

THE COURT: Pardon?

MR. SALANTRIE: It is the law, I believe, and it is also our defense which has been made fairly clear at this point.

THE COURT: I don't believe this is the law that to [Tr. 242] establish knowing possession of a firearm the government must prove beyond a reasonable doubt that the defendant willfully and consciously possessed an item which he knew to be a firearm. That's not the law.

MR. SALANTRIE: Judge, I am referring to --

THE COURT: There is no willfulness in possession of firearms, illegal firearms.

MR. SALANTRIE: I am citing from U.S. vs. Parker.

THE COURT: And you don't have to know that a firearm, that which is a firearm, actually is a firearm within the meaning of the law. And, by "firearm" I mean a machinegun, sawed-off shotgun, hand grenade, silencer, something like that.

MR. SALANTRIE: I respectfully disagree. I believe U.S. vs. Parker and U.S. vs. Freed make it clear it's not a strict liability offense. They have to establish the person knew it was a firearm and they had to know that it existed. They didn't have to know that it was unregistered or the government does not

have to prove that the defendant knew it was supposed to be registered.

THE COURT: Why don't you check Justice Blackmun's opinion that the Supreme Court used when he was a judge on the Eighth Circuit? I don't think they're correct in their holding but it's there as to that particular facet of this whole problem.

[Tr. 243] MR. SALANTRIE: I also did cite a Supreme Court of the United States case, United States vs. Freed, which I don't have the entire case with me, which I can provide that, that is cited in United States vs. Gates which I provided to the Court. It's a Seventh Circuit case, 1974 and on Page 721 it states:

> "We must assert whether the evidence together with all reasonable inferences and viewed in the light most favorable to the government was sufficient to prove that defendant was guilty beyond a reasonable doubt of violating 26 U.S. Code 5861(d)."

I believe that is the possession of the unregistered firearm.

> "In so doing we are guided in our determination by United States vs. Freed,"

which is cited on my jury instruction. And, in his concurring opinion, Mr. Justice Brennan enunciated the quantum of proof necessary to sustain a conviction under that particular statute:

> "To convict appellee of possession of unregistered hand grenades or hand guns the government must prove three material elements: Number one, that appellees [Tr. 244] possessed certain items; two, that the items possessed were hand grenades" -- or in my situation were firearms -- "and, three, that the hand grenades were not registered. The government and the court agree that the prosecutor must prove knowing possession of items and also knowledge that the items possessed were hand grenades" -- and I would argue by extrapolation, they were firearms. "Thus, while the court does not hold that no

> intent at all need be proved in regard to one element of the offense, the unregistered status of the hand grenades, knowledge must still be proved as to the two other elements."

So, basically, they're saying as to whether or not a defendant knew the hand grenades were unregistered they don't have to prove that knowledge; but the government does have to establish knowledge as to the other two elements, be it that they were possessed and that they were firearms.

Since the government here is not proceeding -- at least I don't think proceeding -- on an actual possession argument and in all likelihood proceeding on a constructive possession argument, they have to establish an ability to [Tr. 245] maintain control or dominion over the items which they could probably very easily do because it's in his truck right behind him. They also have to establish he knew they were there, had knowledge of their existence; without that, there is no constructive possession.

And that's why I submitted that jury instruction on constructive possession. The pattern instruction does not include the word "knowledge" or "knowingly." However, the indictment mentions knowingly on all three counts, charges knowing possession, and I think the law on constructive possession is stated in Parker as well as United States vs. Freed, which states that the government has to prove knowledge of the existence of the items.

Mr. Rogers' defense, quite clearly, from the statement is, he had no knowledge that they existed. That has to be a defense. If the jury were to believe he was without knowledge, he is not guilty. If they believe he did have knowledge, then he is guilty. But there is nc pattern, I didn't find a pattern instruction, that addressed the knowledge aspect of it. I had to go to the case law. And in United States vs. Parker it states:

> "To establish knowing possession" -- and that is what he is charged with in the indictment, knowingly possessing -- "To establish knowing possession of [Tr. 246] unregistered firearm" -- and it's in the second head note, Your Honor, under Internal Revenue 2410 -- "government was not required to prove in addition to fact that defendant willfully possessed the weapon that he had no good reason to justify the possession. Government, rather, was only required to show that the defendant willfully and consciously possessed the item which he knew to be a firearm."

And, based on those cases, those three cases that I have submitted, as well as Freed, which is mentioned in United States vs. Gates, which is the long opinion, I just didn't have a chance to make a copy of, I submit that the three -- the two jury instructions relating to knowledge and constructive possession are, in fact, the law, number one; number two, are, in fact, the defense; and, number three, I believe the law is such that a defendant is entitled to an instruction on his defense if it is consistent with what the law is. And that is mentioned in United States vs. Parker in the first head note and that's the Fifth Circuit, as I stated, at 556 F2d 1304 which just says, and I'm just referring to the head note, but it also mentioned in the opinion, Head Note 1:

> "Defendant was entitled to jury [Tr. 247] instruction relating to theory of defense for which there was any foundation in evidence."

There is ample evidence at this point in the government's case of lack of knowledge. It's right in the statement.

* * * *

DIRECT EXAMINATION OF GEORGE ROGERS

[Tr. 291] GEORGE G. ROGERS, DEFENDANT, SWORN.

THE COURT: Please be seated.

Please tell us your full name, your occupation; spell your last name for us, please.

THE WITNESS: George G. Rogers, R-o-g-e-r-s, and I'm totally disabled from Vietnam. I draw a Government check.

THE COURT: Please proceed.

[Tr. 292] BY MR. SALANTRIE:

Q. George, allow me to direct your attention to, was it March, 1991, the time of your arrest; do you recall back then?

A. Yes, sir, I do.

Q. At that time where were you living?

A. I was living off of 84, out in unincorporated Broward County.

Q. And were you working at that point?

A. Yes, I was a fishing guide and I make custom made fishing rods.

Q. Do you have any hobbies?

A.- Yes, sir, I do.

Q. You indicated before that you are totally disabled.

A. Yes, sir, I am.

Q. Are you able to work?

A. For myself, but for no one who has Workman's Compensation insurance.

Q. So when you say you were working back then, were you working for yourself?

A. Yes, I was.

Q. And you said you were making fishing rods?

A. Yes, sir.

Q. For yourself?

A. That night I was making a fishing rod for myself, yes.

[Tr. 293] Q. And how long had you lived in Ft. Lauderdale at that point?

A. Since November of 1968.

Q. And what were you doing prior to 1968?

A. In Vietnam.

Q. Where were you born?

A. Newport, Kentucky.

Q. When did you go to Vietnam?

A. Went to Vietnam in '64.

Q. And when did you get out of the service?

A. 1966.

Q. What branch?

A. I was with the 101st airborne, transferred to the Fifth Special Forces group.

Q. And were you discharged?

A. Yes, I was.

Q. In what fashion?

A. Honorably.

Q. And that was in '66 you indicated?

A. Yes, sir.

Q. And what did you do for the couple of years before you moved to Ft. Lauderdale?

A. I was up home on the farm recuperating from wounds that I'd received in Vietnam.

Q. What were those?

[Tr. 294] A. I had a pungee stick go through my right ankle, I was shot in this hand, in the head and through this leg.

Q. And in '68 you moved to Ft. Lauderdale?

A. I could not stand the cold weather up in the north, I had to come south.

Q. Directing your attention then to the evening of March 15th, 1991, do you recall what you were doing that day or that evening prior to being arrested?

A. That day we had taken the bed off my pickup truck and put a diamond plate liner in it and put it back on.

Q. And what were you doing that evening prior to going home?

A. That evening I was working on my fishing rod, fishing rod that I was making for myself.

Q. And at some point in time did you -- Let me backtrack. Where you doing that, wrapping the rod?

A. You mean the address?

Q. Well, where, yes?

A. The fishing store, the tackle store on Taft Street.
Q. And what time did you leave, approximately?
A. It was about 11:30 or maybe a little later.
Q. What did you do after that?
A. I got in my truck and I started home, went down Davie Road Extension through Davie. As I passed the Beer Barn there was a bunch of pickup trucks and people there. Being a Thursday night which is highly unusual I thought perhaps they [Tr. 295] were having a pool tournament. I shoot pool a bit. I turned around. I went back in.
Q. How long did you stay?
A. Five minutes.
Q. Then where did you go?
A. Home.
Q. At some point in time did you observe red emergency lights?
A. Yes, I did.
Q. Police lights?
A. Yes, I did.
Q. Where were you at that point?
A. I was about 200 yards from my home.
Q. And what did you do when you saw them?
A. They were at a guard shack, they were not behind me and I slowed down to a crawl to see if an ambulance or fire truck was coming into our mobile home park.
Q. And then what did you do?
A. I pulled into my driveway.
Q. And then what occurred at that point?
A. I had a -- The .22 pistol was in my --
Q. What did the police do?
A. They sit there.
Q. Did they pull up behind you at some point?
A. No, not at that point they did not.
[Tr. 296] Q. Okay. Go ahead.

A. I reached over and took the .22 pistol out of my glove box, stepped out of the truck because I could not get it in my pocket sitting in the truck, put it in my pocket, started into my house. That's when the officers pulled in behind me.
Q. And did you have -- Is this the .22 --
A. Yes, that is.
Q. You had that in your pocket?
A. I put it in my pocket when I got --
Q. When the police arrested you it was in your pocket?
A. Yes, it was.
Q. And did you have another gun in the car?
A. Yes, sir, I did.
Q. That would have been Government's Exhibit No. 9?
A. Yes, sir.
Q. This Baretta?
A. Yes, sir, but that Baretta was in a zipped weapons case.
Q. Where?
A. Laying beside me in the truck.
Q. And you left that there when you got out of the truck?
A. Yes, I did.
Q. And at some point in time you were arrested for DUI?
A. Yes.
Q. And the resisting and to carrying concealed firearms, right?
[Tr. 297] A. There actually wasn't the resisting --
Q. I understand, but that's what they charged you.
A. Yes, sir.
Q. And you went to trial on all those?
A. Yes, I did.
Q. And when was that?
A. That was in June of 1992.
Q. And you were found not guilty of all those charges?
A. I was acquitted, yes, sir.
Q. And what occurred after you were arrested?
A. When the officer arrested me --

Q. What did they do with you?
A. -- they put me in the back of the police car.
Q. And do you know what the police were doing at that point?
A. Yes. They were tearing my truck apart.
Q. Back at your home when you were arrested, were you on your own property?
A. Yes, I was.
Q. Were you ever confronted at your residence by any of these items here that were introduced?
A. No, sir, I was not.
Q. Now these cartridges, the black cartridges, the .380 --
A. Magazines?
Q. Yes.
A. Yes, sir.
[Tr. 298] Q. One was where?
A. One was in my pocket.
Q. The other one?
A. In the weapon.
Q. That's the .380 Baretta, correct?
A. Yes, sir.
Q. And these 10 millimeter magazines --
A. Yes.
Q. -- were somewhere, where?
A. They were in the glove box.
Q. Other than these items here, were you confronted with any of these items back at the scene --
A. No, sir.
Q. -- that were introduced?
A. No, sir.
Q. Were you asked back at your home or at the scene about any of these other items, specifically the black canvas bag, the silencer, the MAC-11, the MAC-11 cartridges, all that stuff, were you asked about any of that by any of the officers there?
A. No, sir. No, sir, I was not.

Q. You heard Officer Mashnouk testify that he found a black canvas bag behind the bench seat in your pickup truck.
A. Yes, I did.
Q. He testified that there was this black canvas bag there [Tr. 299] containing a bunch of items.
A. Yes, sir.
Q. Did you then have any knowledge of that black canvas bag containing all those items?
A. Absolutely not.
Q. Were they yours?
A. Absolutely not.
Q. Did you have any idea they were back there?
A. No, sir, I did not.
Q. When was the first time ever you saw all those automatic weapons?
A. I was arrested about 12:26, I believe is on the ticket. They said nothing to me at all until a quarter after 3:00 in the morning.
Q. And where was that?
A. That was at a substation in Weston.
Q. And you were brought there?
A. Yes, sir.
Q. Is that when you first met Agent Armstrong?
A. Yes.
Q. What about Agent Kilmer?
A. Yes.
Q. And Bob Faulkner?
A. Yes.
Q. That's Detective Faulkner, right?
[Tr. 300] A. Sergeant.
Q. Sergeant? Okay.
You were questioned, correct?
A. Yes, sir.
Q. By all three of those individuals, right?
A. Yes, sir.

Q. And did you agree to speak with them? Just answer the question.
A. Yes, I did.
Q. Did you want the discussion to be taped?
A. Yes, I did.
Q. Why is that?
A. Because it was taped before that.
Q. The statement that was played here today or yesterday, I guess it was, did that accurately reflect the discussions you had at that time with the exception of the redacted part, putting that aside, what was played was that accurate?
A. It was accurate to what was said on the tape but it wasn't accurate to what was said off the tape.
Q. Okay. What else was said?
A. Oh --
Q. How long did you speak with the agents?
A. A long time. I was there they claim it was 3:00 o'clock. It seemed like it was much longer than that. But they asked me many questions about my vehicle which the depositions will [Tr. 301] verify. They asked me -- they told me I wasn't in any trouble whatsoever. I told them I know nothing about this. I had collected guns from the time I was a young man in Kentucky.
Q. I wanted to ask you about that. Are you a gun enthusiast?
A. Yes, I am.
Q. Do you have any experience or training with guns?
A. Yes, I do.
Q. Could you please detail that?
A. This weapon --
Q. Just tell me about your experience.
A. I shoot competition .45. I shoot the Bianchi cup. I shoot plates this big around, six inches, and it's a skill. You have to have the safety on and it's timed. You do it at ten, twenty, thirty and forty yards. If you do not drop the safety when the weapon is pointed downrange you are disqualified. You become

one with the weapon. The weapons are very expensive. They actually shoot and hit much better than the human being can do it.

As my friend testified, I like cowboy guns. I had two or three complete sets but I had to sell them when I got sick and most of my collection -- well all of my collection now is gone.
Q. Have you ever owned any automatic weapons?
A. Absolutely not.
[Tr. 302] Q. Ever owned any silencers?
A. Absolutely not.

Well I don't know what training these people have but they trained us in Vietnam that if we need to silence a weapon use an oil filter or use a 2-liter coke bottle with towels wrapped in it. And at one point we did use silencers in Vietnam.
Q. I should have distinguished it between here and in Vietnam.
A. Yes. Absolutely not.
Q. In this country?
A. Absolutely not. It's against the law. I sold guns back in the early '70's. That was one of the rules and regulations that was read to me by the owner of the shop. They weren't even allowed in our shop. Absolutely not.
Q. What shop was that?
A. The Bob X Sporting Goods Shop. A very serious charge.
Q. Did you give the police permission to search your house?
A. Yes, I did, sir.
Q. Now, when you were brought to the substation tell me what happened. Let me withdraw that and ask you this: Were you brought into a room and did you observe some of these items?
A. Yes, sir, I was brought up a ramp and they opened the door and the table was about as long as two of those put [Tr. 303] together and --
Q. Where were you seated?

A. I was seated at the end of it and Mr. Dale Armstrong was seated to my right and Mr. Joe Kilmer to my left and the weapons were in front of me and that is the first time they said it.
Q. Said what?
A. That that was found in my truck.
Q. What was your reaction to that?
A. I couldn't believe it. I asked them why they hadn't told me at my house or why the officers, every one of them passed by my house. Dale Armstrong passed by my house, the DEA agent, the Organized Crime. I guess they thought I was some kind of a gunrunner or something. Why didn't they stop then? Why didn't they fingerprint the items?
Q. We'll get to all of that.

Let me show you what's been previously marked Government's Exhibit No. 1 and ask you to take a good close look at that inside and out.
A. This is not my bag.
Q. Sure?
A. I am absolutely sure. My bag had tools in it and I have a bass fishing boat and I kept the tools in the bag from the truck to the boat and it had rust in the bottom of it. This bag has no rust in the bottom of it. I do not know where this [Tr. 304] bag came from. It does not belong to me.
Q. When is the first time you saw that bag?
A. I seen that bag -- That night I seen it but I had my glasses off.
Q. Where was the bag?
A. It was sitting about from here, farther than that chair. It was sitting clear at the other end. It wasn't up with this stuff. It was sitting back farther.
Q. During the conversation with the agents did you tell them that that was your bag?
A. I did. I thought that that was my bag.
Q. Did you have a black canvas bag?

A. Yes, I did, but it was not like this.
Q. Well, was it similar, was it black and canvas?
A. It was similar to this but it didn't have the pockets on the side.
Q. All during your conversations with the agents you thought that was your bag and identified it as so, correct?
A. Yes, sir.
Q. When is the first time that you realized that that bag did not belong to you?
A. When they brought it into my state trial.
Q. And how long ago was that?
A. 1992. And I said to you the minute I seen it I said to you, "That is not my bag."
[Tr. 305] Q. Mr. Rogers, let me ask you about Government's Exhibit No. 11 which is a plastic bag, if you will, of some bullets.

MR. SALANTRIE: May I approach, Your Honor?

THE COURT: Yes, sir.

MR. SALANTRIE: Thank you.

BY MR. SALANTRIE:
Q. Was that ever displayed to you?
A. Yes, that was on the table.
Q. Were there bullets in the bag?
A. Yes, there was.
Q. At some point in time in the conversation with Dale Armstrong, Agent Armstrong, you were asked, "Do you recognize these bullets?" You said, "Yeah, they're mine."
A. Yes, sir, I did.
Q. How were these displayed to you at that time?
A. Sergeant -- pardon me -- Deputy Bushnell, the arresting officer, had them in a red handkerchief along with my wallet, my pocket knife. He goes over and takes them out. There was thirteen bullets, they are Hydra Shok bullets and he lays them

down right in the middle of the table. And that's when I said, "Those are my bullets."
Q. And where did they come from?
A. Out of those two magazines.
Q. Talking about the .380 magazines?
A. Yes, sir.
[Tr. 306] Q. One of which was in your pocket and one of which was in the gun?
A. Yes, sir.
Q. Did you ever identify that plastic bag as being yours?
A. No, sir, I did not identify that plastic bag.
Q. Had you ever seen that plastic bag before that night?
A. No, not before that night, I didn't.
Q. The first time was at the conference table?
A. Yes, sir.
Q. You appeared, to say the least, very upset and crying at some portions during that interview. Is that right?
A. Absolutely. This is a very serious charge. I mean, it's affected my whole life already. It's a very -- the U.S. government is hard to combat when you're poor and it's very difficult.
Q. Were you handcuffed during this interview?
A. Yes, sir, I was.
Q. Where, how?
A. Behind my back.
Q. Did that have any effect on you, on your hands, your arms?
A. Yes, my hands were swollen very badly.
Q. Did you have your glasses on?
A. No, sir. They wouldn't give me my glasses or my watch. They took it off. I don't know why they did that.
[Tr. 307] Q. Do you know who took the glasses?
A. Sergeant Bushnell had them.
Q. Or Bushong?
A. It's Bushong? Okay, I'm sorry.

Q. Was there a discussion that you had with the agents, Agent Armstrong in fact, regarding fingerprinting the items that you denied knowledge of?
A. Absolutely.
Q. Tell us about that.
A. He asked me first if they fingerprinted that would my prints be on there and I said no. And he said, "None?" And I said, "Absolutely not."
Q. Would they be on there?
A. Absolutely not.
Q. Did you ask the Agent Armstrong --
A. That was one of the last things I asked him.
Q. What did he tell you?
A. He said that they would.
Q. Do you have any physical impairments now, injuries, illnesses?
A. Yes, my ankle. I have jungle fungus in my lungs.
Q. Which is what, agent orange?
A. It's a fungus that is caused by being out in the jungle and about one of three hundred fifty thousand G.I.s that was in Vietnam got it. There's no known cure. The only thing --
[Tr. 308] MR. BARDFELD: I object, Your Honor. This is irrelevant.
BY MR. SALANTRIE:
Q. You don't have to go any further.
THE COURT: Very well.
BY MR. SALANTRIE:
Q. Anything else?
A. Yes. I have a heart problem now.
Q. You mentioned in your statement prostate cancer.
A. They thought I did.
Q. You don't?
A. No, they gave me medication and that has gone away.
Q. Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A. This is a silencer, yes. I know exactly.
Q. You are familiar with it?
A. Yes.
Q. Is this yours?
A. Absolutely not.
Q. Had you ever seen it before that time on the table?
A. Absolutely not.
Q. Do you know how it got in your car?
A. Absolutely not. I do know that my tools have never been recovered.
Q. Mr. Rogers, showing you Government's Exhibit No. 2, do [Tr. 309] you know what this is?
A. Yes. It's a .380 Ingram and it was manufactured first for the police departments and then when war broke out they introduced it into the military. I personally have never had one in my hand.
Q. Is this yours?
A. Absolutely not.
Q. Did you have any knowledge of its existence in your pickup truck?
A. Absolutely not.
Q. When was the first time you saw this item?
A. When Mr. Dale Armstrong picked it up and said, "Do you know what this is?"
Q. You did know what it was.
A. Yes, I know weapons.
Q. Did you deny knowledge?
A. Did I deny that it was mine?
Q. Right.
A. Absolutely.
Q. Did you tell them you didn't know anything about it?
A. I do not know how it got in my pickup truck, no.
Q. This particular exhibit here is wrapped with some sort of leather.
A. Yes, I see that.

Q. Did you do that?
[Tr. 310] A. Absolutely not. That is the most dangerous thing you can do.
Q. What about the rest of this stuff that was in the black bag?
A. Absolutely not.
Q. Have you ever seen this catcher before?
A. No, I did not ever see that before.
Q. Have you ever touched any of these items?
A. Absolutely not.
Q. With the exception of these over here which you admit.
A. Those are mine. Those belong to me.
MR. SALANTRIE: I have no further questions.

* * * *

CROSS-EXAMINATION OF GEORGE ROGERS

[Tr. 312] BY MR. BARDFELD:
Q. Mr. Rogers, on direct examination you were asked a number of questions about the interview that occurred; do you remember that interview?
A. Yes, sir, I do.
Q. And you listened to the tape that was introduced into evidence, did you not?
A. Yes, sir, I did.
Q. And except for the redactions that was accurate?
A. Yes, sir, it was.
Q. Didn't you say on the tape that you no longer drink or you don't drink?
A. I don't drink alcohol. I will have a beer occasionally.
Q. On direct examination you were asked the question where you were coming from and you said you stopped in a bar to shoot pool or something like that. You stayed in there for only five minutes, didn't you say that?

A No, sir. I thought they were having a pool tournament because it's not like that place to have that many patrons on [Tr. 313] a Thursday night. I turned around and came back because I'm a pool enthusiast but they were not having and I only stayed maybe five minutes.

Q. And while you were in there you just stayed and looked around and said this isn't your crowd?

A. No. The bartender recognized me and he set a beer up and I said, " I'm broke. I just spent my last ten dollars on a pizza," and he said, "Well, catch me some other time."

Q. But you drank a couple of beers that night, didn't you?

A. I drank three beers, yes, sir, I did, with a pizza.

Q. In less than five minutes you drank those three beers?

A. Oh, no, sir. The police officers stopped by the tackle store -- well, they called me at quarter after 10:00 and asked me if I had eaten --

Q. Wait a minute. Police officers stopped by the store?

A. No, a police officer called the tackle store --

Q. Which police officer are you referring to?

A. It's a Hollywood police officer.

Q. You are referring to a friend of yours.

A. Yes.

Q. Okay.

A. He asked me if I had eaten and I said no and he said, "Well, order us a pizza." So the pizza store was two doors down. I went down, told them to fix us a large pizza. He came by, he bought the pizza, we both had three beers and [Tr. 314] large pizza.

Q. You also said that you'd been shot four times in Vietnam, is that right?

A. Yes, sir.

Q. But you only have one scar, isn't that correct?

A. No, sir.

Q. You have scars all over?

A. I have here, on my head, this knee and this ankle.

Q. You heard the interview, didn't you?

A. Yes, sir.

Q. On the taped interview they asked you about scars and you said you had one on your ankle, right?

A Yes. He asked me if I had any significant scars and I said, "On my ankle."

Q And you forgot about the other scars at that time?

A Yes, at that time. I was going through quite a bit at that time.

Q. You also heard the taped interview where Agent Armstrong asked you if this was your bag, isn't that correct?

A Yes, sir, I did.

Q. And you heard him testify, you were sitting there at counsel table when he was testifying?

A. Yes, sir.

Q. And when you were going through the tape do you remember at different portions of the tape I would have Agent Gomilla [Tr. 315] stop the tape and would ask exactly what exhibit he was referring to, isn't that right?

A Yes, sir.

Q And Dale Armstrong said at that time when referring to this bag, he said -- okay -- and you said the tool case was yours, right?

A. Yes, sir, I did.

Q. And he raised this and he said this is the tool case that you were talking about at that time, right?

A. Yes, sir, that's correct.

Q. So at that time you said this was the tool case.

A. That night I thought it was.

Q. Now you say it's not your tool case?

A. No, sir. I said that in the State court. The moment they introduced that in my State trial I told my attorney, I said, "That is not my case."

Q. What is the difference between this case and the one that you had?

A. The one that I had had no pockets on and was, I believe, slightly larger.
Q. Where is your case, do you know?
A. I asked them to check the truck and the tools and case have never shown up.
Q. You didn't have your glasses on during that interview, isn't that right?
[Tr. 316] A. I did not, no sir.
Q. Yet every time the agent would raise this you knew exactly what it was, isn't that right?
A Yes, sir. He was sitting about three feet from me.
Q. In fact, when Agent Armstrong asked you -- First he asked you if this was yours and you said no, right?
A. Yes, sir.
Q. But then he asked you what it was and you knew exactly what it was, didn't you?
A. Absolutely.
Q. And you knew this was a .380, didn't you?
A. Yes, sir.
Q. Isn't a .380 going to look exactly like a .45?
A. Oh, no, sir. That looks nothing like a .45.
MR. BARDFELD: One moment, please.
BY MR. BARDFELD:
Q. Isn't this going to look exactly like a 9 millimeter?
A. MAC --
Q. The only difference between the two?
A. No, the MAC-9 is much bigger than that.
Q. Do you know exactly what caliber weapon was fired from that, right?
A. Sure.
Q. A .380?
A. Sure. I've gone to many, many weapons shows and I know [Tr. 317] the weapons.
Q. And you also know exactly what this is the moment --
A. I've used those silencers in Vietnam, yes, sir.

Q. The moment Agent Armstrong showed it to you during your interview you said, "Oh, I know exactly what this is."
A. Absolutely.
Q. Yet you claim you've never seen any of these before.
A. No, sir, I've not.
Q. These are your bullets?
A. No, sir, they are not.
Q. You did have .380 caliber bullets in your car, did you not?
A. I had thirteen .380 Hydra Shok.
Q. .380 ammunition is the same ammunition that goes in this machinegun, does it not?
A. Yes, sir, it is.
Q. When asked during the interview you also knew exactly what Government's Exhibit No. 10 was, did you not?
A. Yes, sir.
Q. The bafflings?
A. Yes, sir. I could have bought those at the show three weeks ago.
Q. But you knew exactly what they were the moment they were shown to you?
A. Absolutely, sir. When you depend your life on silencers [Tr. 318] you know how to take them apart and work on them, you know their elements.
Q. You deny knowledge of the existence of any of this, the bag, the silencer, the machinegun, is that right?
A. I didn't hear all the question, sir.
Q. You deny knowledge of any of this?
A. Yes, sir, that does not belong to me and it has never at any time belonged to me.
Q. Would it be fair to say that you believe that you were set up in this case?
A. Sir, I am not -- I do not know what happened. My hand to God, I do not know what happened. I do not know how that

got in my truck and I do not know what happened. I only know that it is not mine.

Q. Even though you originally said that this bag was yours?

A. That night, sir, I thought it was mine. It was setting from about where I am to my attorney.

Q. But you had no problems identifying anything else, isn't that right? I mean, wasn't everything else the same distance away?

A. No, sir.

Mr. Armstrong was hands-length away and he would pick it up and he would hold it and he would say, "Do you know what this is?"

Q Oh, but everything else except for this particular bag he [Tr. 319] held up, right?

A. Yes, sir.

Q. So you are saying that the reason you were unable to determine that this was not your bag was it was far away while everything else was close.

A. Yes, sir.

Q. That's what you're saying?

A. Yes, sir, it was. It was on a filing cabinet above the two arresting officers that were doing their paperwork.

MR. BARDFELD: May I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. BARDFELD:

Q. All of the weapons were on the table but the bag was on a filing cabinet --

A. Yes, sir.

Q. -- a long way away?

I show you what has been marked as Government's Exhibit No. 16 for identification. Take a look at that picture.

A. Yes, sir.

Q. That's the same bag that you said was yours, isn't that right?

A. Yes, sir.

Q. That bag in that picture is on the table with the rest of the weapons, with these weapons, isn't that right?

A. Yes, but this is not how it was laid out when I was [Tr. 320] there.

Q. That was done afterwards or beforehand?

A. It had to be because this wasn't the way it was laid out when I walked in.

Q. So all of the items that Agent Armstrong was showing you were on the table except for this.

A. Yes, sir.

Q. And the reason this was a long distance away that's why you didn't know it was yours, is that right?

A Yes, sir. That's correct.

Q. But everything else was on the table?

MR. SALANTRIE: Objection: asked and answered.

THE COURT: Sustained.

MR. BARDFELD: I have no further questions.

THE COURT: Very well. Redirect.

MR. SALANTRIE: No, sir.

THE COURT: Thank you, very much. You may step down, Mr. Rogers.

THE WITNESS: Thank you, Your Honor.

* * * *

CHARGE CONFERENCE

[Tr. 324] THE COURT: Let's begin with the charge conference in the U.S. vs. Rogers case.

Each of you have received a copy of the charge pack before lunch and I take it you had a chance to go over them; if you haven't, why, please speak up for the record.

Does the Government have any objections or suggestions as to the Court's proposed charge pack.

MR. BARDFELD: No, Your Honor.

THE COURT: Does the defendant have any objections or suggestions to the Court's proposed charge pack?

MR. SALANTRIE: Yes, Your Honor, I do.

THE COURT: Okay.

MR. SALANTRIE: Initially I have submitted three special instructions, requested ---

THE COURT: I know, but I think they're adequately covered.

MR. SALANTRIE: So they're denied then?

THE COURT: They're all denied.

MR. SALANTRIE: Okay.

My objections are as follows and\or suggestions are as follows: Page 9 essentially defines Count II, the essential elements and I believe that there should be a third essential element in there, that being knowledge or knowing. [Tr. 325] It exists in Count I on the previous page as a third element: "Such possession must be knowing." It exists in Count III in the first element on Page 10, "that the defendant at the time and place charged in the indictment knowingly possessed."

THE COURT: That's right. If you'll read the last paragraph you'll understand why it's not there.

MR. SALANTRIE: I've read that and I understand that; however I don't think it should be No. 3 so it's very clear to the jury that there's three elements. If that's the third element as it is in fact, it should be listed as third and that the possession was knowing or knowingly. It is listed in the indictment knowingly.

THE COURT: It also is listed there in the last sentence, "it must be proved beyond a reasonable doubt that the defendant knowingly possessed the item as charged," and such item was a firearm and --

MR. SALANTRIE: Judge, I understand it's there.

THE COURT: You want me to insert knowingly between defendant and possessed in the first element, I don't care.

MR. SALANTRIE: Sure. That would work.

THE COURT: Okay.

Knowingly, of course, is set forth in a separate instruction later on right after possession.

MR. SALANTRIE: Yes. I have an objection to that also, no.

[Tr. 326] My other objection is on Page 11, on the third paragraph which states -- which is basically a constructive possession definition and states:

> "Who has both the power and intention to later take control over something, either alone or together with someone else, is in constructive possession of it."

I think that is not an accurate statement of the law notwithstanding the fact that it's in the pattern instruction.

THE COURT: Forever.

MR. SALANTRIE: I'm sorry?

THE COURT: Forever. It was a pattern and approved by the Fifth Circuit back in the '70's when I first came on this court.

MR. SALANTRIE: Judge, I have a 1989 Fifth Circuit case that says it's not and if I can just address that.

THE COURT: Well I haven't been reading 1989 Fifth Circuit cases lately ever since we split off from them unless it's called to my attention.

I will admit there is another pattern instruction from either the Seventh -- I think it's the Seventh or Sixth or the Eighth somewhere in the heartland that I like better than this Fifth/Eleventh one.

MR. SALANTRIE: This is a Sixth Circuit case I previously cited and provided to the Court, United States vs. [Tr. 327] Daniels.

THE COURT: I don't think so. I would know it if I saw it, I think.

[MR. SALANTRIE]: This may not be the case but this does -- this is a '75 case actually where it states,

> "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control over the object."

My only request and only objection is that one of the elements has to be that he knowingly has both the knowledge and the power and intention to later take control over something. It's implicit but it's not stated.

THE COURT: But it's certainly implicit.

Well, I don't want to be the one to have the case where the Eleventh Circuit finally changes it's mind on it, but I'm not sure they ever will and what I normally do, frankly, is give their possession instruction, the pattern one, and then if it looks as if a jury is hung up and starts asking questions on me then I try to give an alternative definition --

MR. SALANTRIE: Judge, my --

THE COURT: I can't do that -- I don't want to do that at the beginning.

[Tr. 328] MR. SALANTRIE: Might I cite another case?

THE COURT: There's no reason to assume the jury can't figure this out from this pattern instruction whether or not it applies to this case.

I'm willing also to state on the record very candidly that I talk with my jurors after the trials are over and ask them about things like this and they clearly don't understand constructive possession as well as they do actual, but I think that is understandable.

MR. SALANTRIE: May I cite --

THE COURT: You just don't find juries holding defendants guilty of possession with intent to distribute very often -- occasionally, not very often unless the defendant touches it or has it in his house under his bed, in his car, some place where he clearly has control, dominion and intention to take control of it later.

MR. SALANTRIE: If I may cite another case. U.S. vs. Hastings, cited at 918 F2d 369, it's a Second Circuit case but it's a 1990 case which is directly on point and it states, and I can provide the Court with this copy, I don't have an extra one here:

> "Instruction that a defendant could be found guilty of unlawful possession of a firearm if he had the power or intention to control a firearm did not adequately [Tr. 329] incorporate knowledge as an element of possession even though court subsequently stated that the defendant must have voluntarily possessed the firearm."

It's stating that power, intention and voluntariness are not enough terms to relate to the jury that knowledge is an essential element. This was reversed and remanded. I have read through this case in detail and it --

THE COURT: What's the cite on it?

MR. SALANTRIE: The cite?

THE COURT: Yes.

MR. SALANTRIE: Is 918 F2d 369. This was a gun-in-the-car case. It's a short opinion.

THE COURT: I like that pattern better than the one we got, I tell you that.

MR. SALANTRIE: I do also, Your Honor. I think it can be easily modified by just putting in that one statement, "which he has knowledge of" and it's cured.

> "A person who is not in actual possession but who has both the power and intention to later take control over something which he has knowledge of

> either alone or together with someone else is in constructive possession of it."

It flows, I think it reflects the law and certainly it is our [Tr. 330] defense that there was no knowledge.

THE COURT: Well, it's kind of awkward. I don't mean to be quibbling about words but:

> "A person who is not in actual possession but also has both the power and the intention to later take control over something of which he has knowledge,"

set off --

MR. SALANTRIE: That's fine.

THE COURT: -- in a positive, "either alone or together with someone else." I think it is accurate. It is awkward a little bit. True, somebody could do a better job of drafting it if we took the time.

I don't have any problem doing that --

MR. SALANTRIE: Okay.

THE COURT: -- "over some things, which he has knowledge. . ."

MR. SALANTRIE: That's all I'm asking.

MR. BARDFELD: Your Honor, I would object. I would just say that the Eleventh Circuit pattern instructions clearly incorporate what is necessary in order to prove the elements of this particular crime. This is a Second Circuit case. Until the Eleventh Circuit comes, I think we can go ahead --

THE COURT: I know that but this isn't the first [Tr. 331] case and time I have expressed this opinion. I've been troubled by our pattern possession instruction for ages largely due to answers and questions I get from jurors when I talk about it with them after the trial is over. And occasionally you can see it in questions they ask.

MR. BARDFELD: Your Honor, if they were to ask questions while deliberating this case, if they had any questions about it we could do it at that time; but until that comes up I think we can use the pattern instruction.

MR. SALANTRIE: They may not ask the question.

THE COURT: If the Government has proved beyond a reasonable doubt that he knew the machineguns were there I think the jury will return a verdict of guilty and if the Government hasn't proved beyond a reasonable doubt that he knew those things were there even though he denies knowing how they got there I think they will find him not guilty; but it is the big issue in the case as far as I can tell.

MR. BARDFELD: Yes, Your Honor.

MR. SALANTRIE: Yes, sir, the only issue really.

THE COURT: I'm going to put a comma after "something," in that middle paragraph, "of which he has knowledge."

Anything else?

MR. SALANTRIE: Yes, sir.

THE COURT: The charge conference is going to be [Tr. 332] longer than your closing argument.

MR. SALANTRIE: Page 12, Judge. Again, I'm adjusting the word "knowingly." I don't think that adequately explains the common meaning of knowingly. Everyone -- it doesn't say anything about knowingly being aware or conscious of. I submitted a proposed jury instruction to that effect and I would just ask that the words, "awareness" or "consciousness" or something to convey to the jury that knowingly means you have to know it's there, the common meaning, the Webster's definition.

THE COURT: I think it is quite clear. Your objection is overruled.

Actually your defense is that it was a mistake or an accident if you want to characterize it that way.

MR. SALANTRIE: Lastly on Page 9, the bottom paragraph where it states,

> "It is not necessary for the government to prove that the defendant knew that the item described in the indictment was a firearm which the law requires to be registered."

I think that is a misstatement of the law.

I would point to United States vs. Anderson, 885 F2d 1248, Fifth Circuit, 1989 some of which states:

> "To be convicted of possession of an [Tr. 333] unregistered firearm under National Firearms Act the government is required to prove that the defendant knew that items in question were 'firearms under Act' not that items in question were 'firearms within general meaning of the term,'"

as well as doubles overruling the United States vs. Vasquez, which also is a Fifth Circuit case.

I think some of the other case law consistent with this instruction, pattern instruction, is relying upon U.S. --

THE COURT: I think this one gets into that --

I think it is ambiguous under the Supreme Court where they cite their new brother associate's opinion in his former bench in the Eighth Circuit, Blackmun, where it was confusing as to whether it's a firearm within the meaning of the statute, at least that's the way I remember it. It's been a long time since I looked at that case; not a firearm in the general sense of a shotgun, rifle, something that will expel a projectile.

The Anderson case was an en banc opinion 827 --

MR. SALANTRIE: Yes, sir.

THE COURT: -- reversing their prior precedent.

MR. SALANTRIE: Exactly. So they evidently thought about it long and hard and reversed themselves.

THE COURT: Maybe the reason they thought about it [Tr. 334] so long and hard is because they had a prior precedent to the contrary. I haven't read the dissent yet and probably won't.

I mean Judge Gee wrote the opinion on the majority. Pat Higgenbottom was on the majority; they are not flaming liberals or bleeding hearts.

The only problem with the Anderson case, the majority was concerned and I think legitimately so where the factual situation where somebody can inherit a weapon or simply by wear and tear, as they say, it can change from semi-automatic to automatic and suddenly this person can be charged as a dangerous felon and yet there is no outward appearance that would indicate it is an automatic weapon rather than a semi-automatic.

And anybody in ATF or that sits in federal court that hears very many of these cases know you can change many semi-automatics into automatics by simply filing off the sear. I think you can convert an M-1 into an M-2 that way, make it fully automatic. And there are kits out whereby you can do that. That's no problem. Somebody buys a kit and makes it an automatic, clearly he has knowledge; but the reasonable wear and tear is another item, although I don't think that's the kind of case we are talking about here.

Even Raven MAC, down here made a firearm or weapon not very long ago which everybody knew who was in on the know apparently but reasonable wear and tear would quickly convert [Tr. 335] that -- where the control that kept it from becoming automatic and that it would be just, no pun intended, automatically become an automatic, fully automatic. And Judge Gee has gone into that twice now in this opinion. He doesn't usually say things more than once. To be sure what defendant seeks here would prevent against that situation.

I was just looking at the dissenting opinion, find out there is only one opinion in the dissent. It starts off and

stays with the argument pretty much anyway, at least it starts off with the problem of stare decisis and their interpretation of the Freed opinion in the Supreme Court.

MR. SALANTRIE: Which I have cited previously. Apparently two different interpretations of that.

I think the bottom line in this case is on Page 1255, if I might, Your Honor, on the right-hand side which states:

> "We overrule Vasquez" -- bottom there -- "under which innocent possession of a worn or altered autoloader can result in jail time. Such rule is unjust and dangerous and there is little if any need for it, for in most cases as in this one Mens Re will be provable if it exists."

This is a case where we have an altered semi-automatic weapon and it would require the expertise of the [Tr. 336] gentleman from ATF in Washington to come down and explain how and why wrapping shoe leather or a shoestring around the trigger safety in conjunction with internal modifications render that firearm automatic whereas it was manufactured as a semi-automatic and a totally legal weapon.

THE COURT: Well Vasquez is binding on this Court.

MR. SALANTRIE: It was overruled, though, by Anderson.

THE COURT: In the Fifth Circuit but at the time of 1981 we took the Fifth Circuit controlling law as the controlling law of the Eleventh Circuit and until the Eleventh Circuit goes the way the majority did and whose to say they would because the facts are different. Even in their statement about we overrule Judge Gee comes back to this thing he has been harping on about possession of a worn or altered autoloader.

Yours is on Count II.

MR. SALANTRIE: Yes, sir.

THE COURT: If you'll just read the last sentence you're adequately protected, sir.

MR. SALANTRIE: It seems the first sentence and the second sentence are mutually exclusive. One says it's not required for him to have knowledge that it's a firearm. The second says it is. It has firearm in quotes.

> "It is not necessary for the government to [Tr. 337] prove that the defendant knew that the item described in the indictment was a firearm which the law requires to be registered."

Not required.

> "What must be proved is that he knowingly possessed the items charged as such --"

THE COURT: Your client has gotten on the stand and testified that he knew instantly that that silencer was a silencer and a firearm and it was bad and he shouldn't have it. We could take that sentence out of there.

MR. SALANTRIE: He didn't say he knew it should be registered.

THE COURT: The way I remember his testimony that's the way it came out.

MR. SALANTRIE: He said he knew it was a silencer and that they're bad, yes, sir, he certainly said that; but there was no query regarding whether he had actual -- whether he had knowledge --

THE COURT: Anybody knows as much about weapons as he has demonstrated, you know.

MR. SALANTRIE: Certainly, Judge, that argument can be made.

THE COURT: That why he was --

MR. SALANTRIE: It seems like that first sentence [Tr. 338] and second sentence are contradictory.

THE COURT: Objection is overruled.

MR. SALANTRIE: That is all I have, Judge.

THE COURT: Very well. End of the charge conference.

* * * *

CLOSING ARGUMENT OF DEFENDANT

[Tr. 365] Members of the jury:

This will be my only opportunity to address you this [Tr. 366] afternoon. Unfortunately for me the government has the rebuttal, sometimes called the hammer, and he will have an opportunity to rebut or comment on anything I say to you at this point. I will not have such an opportunity. I just ask you to keep in mind and consider what I have said as well as the evidence as well as anything I might have said to rebut his remarks.

At this time also I would like to thank you for your time, thank you on behalf of myself as well as George Rogers for your time, your patience and your consideration in this case.

At the conclusion of the arguments, actually tomorrow, His Honor, Judge Roettger, will read the instructions or, in other words, the law of the case, and it's the only law that applies here, and I will discuss a couple of those with you in a moment. Thereafter you will begin your deliberations and sit in judgment of George Rogers who is accused in a three count indictment as you are aware, who has pled not guilty to these charges, who has emphatically and adamantly and repeatedly and consistently denied possession or knowledge of those items.

Now, I want to touch upon, very briefly, a couple of the legal principles and I don't want to bore you with it, you heard it before, but I just feel duty-bound and obligated to mention it to you because it is the whole crux of [Tr. 367] our judicial system, criminal judicial system.

As you know and are aware, Mr. Rogers, like me, you, anybody in this country, is presumed innocent of any allegations, certainly is at this point, and that the burden is strictly and exclusively on the government to prove guilt of the elements which we will discuss beyond and to the exclusion of a reasonable doubt.

Mr. Rogers does not have to prove his innocence to you, it is not required. No one accused is required to do that. And, lastly, the standard of proof in a criminal case, as you are aware, is much different, much higher, than a civil case, it's proof beyond and to the exclusion of a reasonable doubt. And that doesn't mean you think so, possibly is, could be, might be, looks like it, I have a suspicion that, it's a strong suspicion, clear and convincing evidence. None of that is good enough.

I ask you to look to the evidence, look to the conflicts in the evidence, look to the lack of evidence to determine whether or not there is a reasonable doubt as to the allegations in this case.

Now, the Court will read you an instruction on reasonable doubt, I believe it did already, and he will advise you, and I'm not going to read the whole thing, that:

> "Proof beyond a reasonable doubt is a very heavy burden and that the proof must be of [Tr. 368] such a convincing nature that you would be willing to rely and act upon it without hesitation in the most important of your own affairs."

You should keep that in mind.

> "The right of the people to keep and bear arms shall not be infringed."

Perhaps you've heard that. So says Article II to the United States Constitution which was ratified in 1791.

We have citizens, all of us have a right, many of you do, in fact, to own firearms. It's perfectly all right to own firearms. And, as Dale Armstrong testified, the vast majority

of all that stuff is perfectly legal. You can buy it in any gun show, you can have it in your house, business or whatever. So, please don't be overly influenced by some of these things over here, the Derringer, .380. They're perfectly legal. They're perfectly okay.

Obviously, there's two things at issue that we will talk about.

Now, before the government can sustain its burden of providing guilt in these three counts, they have to prove a number of things which His Honor will read to you only two of which are important from my standpoint and that I will discuss with you. They have to establish possession. And the government has to establish and prove beyond a reasonable [Tr. 369] doubt knowledge that he knew, in fact, and they have to prove knowledge beyond and to the conclusion of a reasonable doubt. That they have failed to do.

As you are aware, and I'm not going to go through it all, he denied it repeatedly. You have heard it, I don't need to say it any more, ownership, knowledge of this silencer, has no idea how it got there, as well as the MAC-11 sitting over here. He denied knowledge of that also. And that's what he's on trial for today, not that other stuff.

Now, the government seems to make a big deal about these bullets here and at first blush you think it is very important because they also happen to fit this .380 because they're both .380's. But, as Deputy Mashnouk candidly told you, he got them out of this other .380, got them out of this clip, got them out of the other MAC clip, one which was in Mr. Rogers' pocket, one which was in the firearm. He told you that, and he put them in the bandana which Mr. Rogers and only Mr. Rogers explained was put in front of him and he said, "They are my bullets." That's what he was talking about on the taped statement which you read and heard.

Deputy Mashnouk also said he found this plastic bag with some bullets, he had no idea, be it 35 or 36. There's

missing bullets here. Not so important, really. He found a plastic bag with some bullets in this bag.

Mr. Rogers has absolutely never admitted knowledge [Tr. 370] of this plastic bag or its contents which were inside the black canvas bag. What he admitted, you will recall, is those other .380's that were in the red handkerchief which he said, "They're mine, Hydra Shoks," which is a kind of .380. Don't get confused about that, please.

Now the Government saw fit to introduce evidence of a DUI; evidence of resisting without violence; carrying a concealed firearm, which is this Baretta; evidence of carrying a concealed firearm which is the .22. As you are aware now that was heard already before another jury and he was found not guilty of all those charges and that's it. No wrongdoing at all in relation to those other items. The jury has spoken already.

Now let's go to the read important issue here: Did he possess those two things or didn't he? And moreover, more importantly does the Government prove it to you? And secondly, did he have knowledge of those items, those two or not? And more importantly, did the Government prove he had knowledge beyond a reasonable doubt? And the last count has to go with registering this firearm, this silencer here.

First of all, Dale Armstrong said you can't register it because there's no serial number to register it. More importantly though, Mr. Rogers didn't register it because he didn't know about it. He had no knowledge of it, so how could he register it?

[Tr. 371] This certificate which you will get an opportunity to read certifies that a silencer, no serial number, was not registered. I don't know what that particularly proves. It doesn't prove that this one was not because there is no way to identify it.

It also mentions here a machinegun, this other one here, RPB, with the serial number on here which they do have

a series number, was not registered. The Government made no effort to trade that serial number on that particular weapon to see where it would go, who it would come back to. Maybe they can't do it because it wasn't registered, I quite frankly don't know, but no effort was made.

You will get a packet of instructions the Court has prepared. You will have an opportunity to read them as the Court reads them and take them with you and refer to them when you're in there. I want to mention a couple of them to you. Reasonable doubt on Page 3 I have already discussed. Page 8, 9 and 10 the Court will instruct you of the elements of all three counts. I'm not going to bother reading them to you. You can read them yourself. Also the Court will read it to you. But there is one very important element in there that is required on all three: Knowledge. Mr. Bardfeld didn't mention that in his opening remarks, just "It's in his truck, therefore he possessed it." That's not what the law says. The law says on each one that he either had knowledge or it [Tr. 372] was knowing.

Count I says such possession was knowing and Count II, it says knowingly, all the same thing. You know what the word means. And Count III also it says knowingly possessed. Obviously knowledge has to be proved beyond a reasonable doubt. Now they haven't proved that.

Now lastly, one other instruction is kind of important. It's the constructive possession, and that's on Page 11. You will get to read that also.

The Government has to prove possession. You may have an idea what possession means, it may be different to each and every one of you, but the law in this case will be read by the Court and this is what possession is for this case regardless of what you may think or not think. Basically you have to have actual possession or constructive possession. Actual is when it's right on you. Like I have actual possession of this pen. And you do your glasses back in your pocket. It's

right there, on your body or attached to you or where you can go just like this and touch it. The Government has not proved that, clearly. Deputy Mashnouk testified you can't see it. Even from the passenger compartment or outside the truck you can't see it, can't touch it. It's behind the seat, in the back, on the floor of the pickup truck. So the next issue is, does he have constructive possession because either one will work. What is constructive possession? A [Tr. 373] person -- I will read it to you -- A person who is not in actual possession, which we have here, but who has both the power and the intention to later take control over something, of which he had knowledge, either alone or together with someone else, is in constructive possession of it. So has the Government proved that to you? Once again, they have to prove knowledge, knowing.

Additionally, they didn't make any effort to prove that Mr. Rogers had any intention whatsoever to take control over it at some future date because obviously if he had no knowledge then he has no intention to do that.

Now I'd like to spend a couple of minutes commenting on some of the other things that Mr. Bardfeld mentioned in his closing.

They're making a big deal, I guess we all have to some extent, about this black canvas bag. First of all, possession of a black canvas bag is not illegal. Secondly, the Government wants you to draw some silly deduction that this little piece of leather here is somehow the same leather as this which it may not be. You can guess. The Government would like you to assume, of course it is. There of course has been no testimony, no expert to say, yes this is the same stuff, this came from the same roll, that it's the same diameter. Nothing. Zero. Don't have it. Government doesn't. So there's been no proof of that.

[Tr. 374] Now Mr. Rogers testified about the bag. He candidly admits and it is clear that he did say on the statement,

"That is my tool bag." He said tool bag with tools in it with rust in the bottom. None of that's there.

Now he has adamantly denied today that he's ever seen that bag prior to it being on the table. He says it was down at the end of the table or on the file cabinet. Dale Armstrong said it wasn't. Whatever. I don't know what to tell you. I wasn't there. But the bottom line is that he has told you that now, today, that after closely looking at that, after seeing at the state court, he says he saw it there. It's not introduced into evidence but a lot of things don't necessarily get introduced. That wasn't relevant in the state case, that's why it wasn't introduced.

Doesn't mean it wasn't there. He told you that he saw it then and he told me then and that's his testimony.

So what? He made a mistake. Can't he make a mistake? He didn't have his glasses on. He's handcuffed. He's crying. He's screaming. He made a mistake. Let's convict him because of that. How about Dale Armstrong and all of his mistakes? Remember those? He didn't know 1:30 from 3:00 o'clock in his own report. "I made a mistake." He didn't know if Mr. Rogers was there first or Armstrong was there first. That's pretty tough. He made another mistake. That doesn't mean you should totally disbelieve the guy. [Tr. 375] Everybody makes mistakes. George made a mistake. He thought it was his. He has testified that that's not it. Seeahray has testified, "That's not it. I've never seen it before. I gave him the bag. That's not it."

They make, Government makes a big deal about the fact that Mr. Rogers readily is able to identify and explain what all these items are. They want you to take a quantum leap then because of that assume that there is. Well that's not the case. Mr. Rogers testified that he has been around firearms since the '60's -- or since he was a child; that he used silencers unfortunately in Vietnam where he was wounded. So, sure, he knows what silencers are. Big deal. He knows what automatic

weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes, he knows what they are and he honestly said, "Yes, I know what they are," and expends what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

I don't know if I need to comment about this, you know he said he didn't drink and then he said he had a couple of beers. He testified that he doesn't drink hard liquor; he had a couple beers with a pizza. It's not a big deal. He doesn't drink hard liquor. Some people distinguish the two, some don't.

[Tr. 376] Now, if Mr. Rogers is going to concoct this lie about these items he could have done a hell of a lot better job. He could have said, I don't know what they are, never seen them before. He could have said, yeah, you know now that you mention it, Agent Armstrong, a lot of people had access to my truck. People down at the gun shop, people down at the rod shop, they go fishing. I lend my truck all the time. Heck, I just got it washed and I got it detailed. Had work done on it at the Chevy dealership last week. I mean he could have given all kinds of things but he said honestly, "No, I am the only one that has the keys." He's just being honest. That's not the most favorable answer for him but it's the truth.

A couple of other things. He readily gave them consent. He readily spoke to them and he wanted the tape recorder on. Good for him. Agent Armstrong never uses it. I tell you that he doesn't use it -- because he can get the three or four officers there, they can berate the witness or the defendant or the accused, come at him from eighteen different angles, confuse them, threaten them or do whatever they have to do to get the information they want, promise them something. It's pretty tough to do when the tape is on. Why not just tape everything? I don't understand. Because they --

Armstrong does not want you to know what happened. That's the bottom line. Why else not? But he did in this case. He [Tr. 377] didn't have a choice because George said, "Yeah, I'll talk to you on one condition: Get the tape." Miraculously a guy that never tapes anything has a tape recorder in a car that he always carried around with him. So it's taped. Thankfully it is because you get to hear him. You get to hear him crying. You get to hear how upset he is in there, how he's scared to death of these guys.

Couple of little things I want to just mention, not necessarily a big huge deal but how about -- and the Court will instruct you that you can look at any inconsistencies in testimony between these witnesses and the witness' own testimony to see if they're believable or not. You will also be instructed that you as the jury have the exclusive right to totally disregard any witness at all. You can accept all their testimony, part of their testimony or disregard it totally. That's up to you.

Now I'm not going to tell you to accept or disregard any, that's totally up to you. But I want to point out that you know Deputy Mashnouk with the strong odor of alcohol, glassy eyes, slurred speech -- what else did he say -- strong odor of alcohol. That's funny. Dale Armstrong, saw, observed and smelled none of that. He was in there for an hour and a half, side-by-side. Did you hear any slurred speech on that thing, on that tape? You'd think they'd be consistent. If you tell the truth it should be consistent. Even Dale [Tr. 378] Armstrong testified, "Oh, yeah, he had an odor of alcohol on his breath." Under oath, and of course I had to impeach him by pointing out that on a prior occasion under oath he had testified that there was no odor of alcohol. So then right before you he just retracted it. "Okay, I'm sorry. Never mind. I didn't say that."

Well I guess you're wondering when I'm going to get to this part? Where is the meat? Where is the beef? Where's the prints?

Agent Armstrong had the audacity to sit before you under oath and give you the BS reasons why they didn't make a little tiny effort to get fingerprints. I don't think I need to go through it in any graphic detail with you. You heard it all the first time on my cross-examination. You want to know really why? Because Dale Armstrong fashions himself to be both Prosecutor, Judge, Jury and Executioner. He's got his case. He's got proof positive. How many times did he say, "proof positive"? When I asked him, "If you got the fingerprints and they came back to George you'd have proof positive, wouldn't you?" And what did he say? "I would have additional proof positive." So he's just telling you as far as he's concerned, case closed. We don't need you. Don't need the jury to decide these issues. Dale Armstrong will do it for you. And since he's already made his decision, why bother take fingerprints? Because this guy is facing a lot of [Tr. 379] years, that's why.

The Government -- No fault of Mr. Bardfeld, incidentally. He wasn't the prosecutor at the time. He wasn't there investigating. I say, "the government," that's the government agent. Specifically Dale Armstrong as a government agent had the absolute opportunity to collect evidence in the form of fingerprints that if lifted and matched would have proved beyond a reasonable doubt, would have been proof positive that he had in his hands. You all heard fingerprint evidence is a hundred percent proof positive.

And he gave you all those ridiculous reasons why: labs too busy; didn't think I needed to. And then he had the audacity to say, "Well, it's too difficult."

Then on cross examination he finally admits, "Well, sure it's possible, just a little more difficult." And he talked about all the sophisticated methods available to the

government, to the FBI, the CIA, the ATF and everybody else. And it should be painfully clear to you that this government with all its resources certainly had the capability to try to take latent fingerprints off these items. Not only the MAC-11 but there's over a hundred bullets in there. There's this flash suppressor here. Hundreds of bullets.

Did you ever put a bullet in a gun? It does between your fingertips every single time, all one hundred of them. [Tr. 380] Nah.

I submit, ladies and gentlemen, in the face of such a vehement and adamant denial Agent Armstrong should have done a little bit more. He just disregarded what George said. Why? Because it's in his car, it's in the back seat, so he must know.

The government wants you to assume what they failed to prove to their own neglect. Don't do it. I ask you --

THE COURT: About four-five minutes.

MR. SALANTRIE: Thank you, Judge.

George even asked him, "Please take the prints. I promise you they won't be on there. You can do it right now."

The bullets are still in there. They had three years to do it. One lousy bullet. Or do a couple of them. Maybe it would match. Maybe they would get just one latent print, maybe two. Maybe it wouldn't match George, that he would have proof that he didn't touch it. The government also deprived Mr. Rogers of that opportunity. Maybe some print would come up. They have very sophisticated fingerprint comparison computers which you may or may not be aware of. You put the print in, they've got this computer thing and it comes back and makes a match. They could find out exactly who did possess all that stuff.

And lastly, ladies and gentlemen, you know they really deprive you as the trier of fact, you're charged with [Tr. 381] that responsibility, that very difficult responsibility trying

to figure out what the heck happened and whether they proved their case, whether there was knowledge, whether there was possession. I'm sure you would like to have known those fingerprint results, like to look at them, like to hear about it.

Ladies and gentlemen of the jury, I am going to close now. I'm not going to have an opportunity speak to you again. Thank you for your time, patience and consideration. I just ask you as difficult as it may be, not just assume stuff, don't just assume. If you want to assume anything assume what the law tells you to assume, that he's innocent. Don't take the quantum leap of just because it's in your car, or just because it's in your house. I mean, you would think so, true; but in the face of absolute vehement repeated denials the government has an obligation to do more. They'd didn't. They failed to do it. And I suggest as a result that you should have a reasonable doubt. You can either believe George's denials and in that case he's not guilty. Or you could say based on his denials or based on their evidence, I don't know, I'd like to have some more evidence, in which case you're not convinced beyond a reasonable doubt; and if that's the case I ask you to say so.

Thank you.

* * * *

JURY INSTRUCTIONS

[Tr. 392] Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions -- what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the Defendant not guilty.

[Tr. 393] Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and

interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your [Tr. 394] own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the Defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I don't mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or don't believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did [Tr. 395] the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the

witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

As stated before, a Defendant has a right not to testify. If a Defendant does testify, however, you should [Tr. 396] decide in the same way as that of any other witness whether you believe his testimony.

In this case, as you know, the indictment charges three separate offenses called "counts." I shall not read it to you at length because you will be given a copy of the indictment for study during your deliberations.

In summary, Count I charges that the Defendant knowingly possessed a machinegun. Count II charges that the Defendant knowingly possessed a firearm which was not registered to him in the National Firearms Registration and Transfer Record. Count III charges that the Defendant knowingly possessed a firearm, that is, a silencer, which did not have a serial number. I shall explain the law governing these offenses in a moment.

Next we come to the superseding indictment, it's copied for you. We're just going to scan through this.

The charge in Count I is that on or about March 15th, 1991, at Ft. Lauderdale, Broward County, in the Southern District of Florida, the defendant George G. Rogers did knowingly possess a machinegun, that is, a .380 caliber RPB Industries machinegun, serial number SAP3806432 in violation of Title 18, U.S. Code, Section 922(o).

Count II charges that on or about that same date and time and place, in this district, the Defendant, George C. Rogers, did knowingly possess a firearm, that is, a silencer, [Tr. 397] bearing no serial number, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by that chapter and title of the United States Code and other sections.

Count III charges that on or about the same date and place in this District the Defendant George G. Rogers did knowingly possess the silencer, which firearm was not identified by a serial number as required by the United States Code.

Now we come to the instructions on each count. Count I: Title 18, Section 922(o) makes it a federal crime or offense for any person to possess a machinegun.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: Defendant possessed a .380 caliber RPB Industries pistol, serial number SAP3806432, as charged in Count 1 of the indictment.

Second: This .380 caliber weapon was a machinegun as defined below; and

Third: Such possession was knowing. A machinegun, sometimes known as a "fully automatic weapon", means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger.

[Tr. 398] Count II: Title 26, U.S. Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms which are not registered to them in the National Firearms Registration and Transfer Record.

Title 26, U.S. Code, Section 5845, defines "firearm" as including a silencer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a "firearm," as defined above;

Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.

Let me just stop here right now and, look up, folks. That doesn't mean the ordinary pistol, shotgun, rifle that anybody can buy. It's just the certain ones that -- It's confusing because we use that term "firearm" for that same thing that's so very lawful. It's just these certain things that are defined that have to be registered in the National Firearms Registration and Transfer Record.

What must be proved beyond a reasonable doubt is [Tr. 398] that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that is was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Count III, possession of firearms having no serial number:

Title 26, U.S. Code, Section 5861(i) makes it a Federal crime or offense for anyone to possess a firearm having no serial number.

The term "firearm," as defined by Title 26, U.S. Code, Section 5845, includes a silencer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant, at the time and place charged in the indictment, knowingly possessed a "firearm," as defined above;

Second: That the "firearm" had no serial number.

Third: That the Defendant knew that the firearm had no serial number.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who has direct physical control of something on or around his person is then in actual possession [Tr. 400] of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something, of which he had knowledge, either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession, and also sole as well as joint possession.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government

proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may [Tr. 401] find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any offenses charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted, the matter of punishment is for the Judge to determine.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs solely because the others think differently or merely to get the case over with.

[Tr. 402] Remember, that in a very real way you are judges -- judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreman or forewoman. That person will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience; and folks, you are going to have to look up at this point. Please look up. It is a blue letter-size piece of paper and it has the style of the case up here and it says "verdict" in capital letters here. In the body it says:

> "We, the jury find the Defendant, George G. Rogers, _____ as to Count I, _____ as to Count II, _____ as to Count III, as charged in the indictment; so say we all."

There's a place down here to date it and sign it.

You will take this verdict form with you into the jury room. When you have reached a unanimous verdict have your foreman or forewoman put your verdicts in these blanks, either guilty or not guilty, then you will return with your verdict to the courtroom.

If at any time -- Have your foreman or forewoman date it, sign it and then you can come back to the courtroom.

Ladies and gentlemen of the jury if, at any time, [Tr. 403] you need to send a message to the Court, there will be a court security officer outside your door at all times, he will be in a blue jacket and badge and he will bring the message to me and I shall respond as quickly as possible either in writing or by bringing you back into the courtroom where I can address you orally.

And remember you're not to tell your numerical difference to anybody, not even the Court until you have reached a unanimous verdict.

And with that I need to see the lawyers one more time, folks at the sidebar.

* * * *

ENTRY OF VERDICT

[Tr. 410] THE COURT: Neither lawyer has tried a case in front of me, I don't believe, since I've been following this practice I just engaged in. I discharged the jury and they are invited back to the jury room and it's a technique I borrowed from Judge Dowd in Cleveland. I tell them that -- - the example in baseball terminology of a runner at third base, one out, the batter hits a fly ball, the center fielder, left fielder, right fielder, whoever, as soon as the outfielder catches the ball, the runner tags up and runs for the plate and the outfielder throws the ball home or to a relay man as quickly as possible and the runner gets to the plate, he slides and the catcher catches the ball and makes the tag.

I tell them then, What does the umpire do? Signals out or safe. And he makes his decision right then while the evidence is freshest in his mind; and that they have done the same thing. They have made their decision while the evidence is freshest in their minds, and never gets any fresher. They did it as soon as all twelve of them could agree to it.

And then I remind them, What did the umpire do next? He turns his back and walks away. And I tell them that's what I want them to do because the evidence is not going to get any clearer to them tonight or tomorrow or the middle of the [Tr. 411] night. Maybe not on this jury, but I have had juries in the past where a little old lady would reach over and put her hand on my arm and say, "Thank you, Judge, for telling me that," because you can tell they're already starting to worry about it.

And I ask if they have any questions. They always have questions back there. They don't have any out here, but they always have them back there. They want to know about the sentencing process.

I think I can tell you this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously was a close question for them and because I think they felt he, I don't know if it was because of his war record or what happened in the war, or because of his unequivocal answers, but they did feel that compassion.

It doesn't change the verdict. Therefore, I must ask the Marshal to escort the defendant to the bar.

George G. Rogers, the jury having found you guilty of the crime charged in Count I, and guilty of the crime charged in Count II, and guilty of the crime charged in Count III, as charged in the indictment, the Court now adjudicated you guilty of the crimes charged in Count I, Count II, and [Tr. 412] Count III.

* * * *

EXCERPTS OF SENTENCING HEARING

[TR. 16] THE COURT: May I see the Probation Officer?

[Tr. 17] It is only about every five years or so you get a defendant takes the stand and testifies the way Mr. Rogers does, straight up, clear-cut, flat-out, no fudging or hedging, and it's always refreshing. I know the jury had trouble with their deliberations. Some of them were in tears when the verdict was published and they certainly were in tears when I went back to the jury room to talk to them like I always do when a guilty

verdict is returned. I don't ever remember any in my post-verdict discussion with jurors seeing that many of them in tears. Of course, I've only been doing it for a couple of years. Never leaves me with a satisfied feeling but it happens on occasion. It's happened here; and I think the jury was very conscientious despite their tears and that's because of the respect I think they felt for you. They still felt that, on the basis of the evidence, that the government had proved its charges beyond a reasonable doubt.

I don't think it makes any difference what way I rule on the outstanding objections, I'm going to impose a sentence of time served on the defendant, anyway. And I think it's significant because in the presentence report the Probation Officer points out that the defendant -- see if I can find it here. Paragraph 14:

> "Defendant is extremely distraught over his conviction and accompanying loss of civil rights."

[Tr. 18] I find that very significant because the mealy-mouth low lives that come before me for sentencing, they aren't concerned about the loss of their civil rights. The only thing they're concerned about is how much time they're going to get.

The defendant pretty well maxed out when he came in here for trial. He knew he wasn't going to get any more time or at least not very much more at the maximum, and he is concerned about his conviction and his loss of civil rights.

That speaks worlds for you, sir. I haven't said that very often at sentencing, once or twice, and they always seem to be in ATF cases. I don't know why. Maybe that's the nature of firearms. Maybe it's in the nature of people who have firearms. Maybe that's all the same thing.

Anyway, I have considered the statements of the parties and I have reviewed the presentence report. I am going to impose a sentence of time served in this matter.

* * * *



(6)

Supreme Court, U.S.
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No. 96-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

58 1342

QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

A. Factual Background 3

B. Proceedings In The District Court 4

C. Proceedings In The Court of Appeals 6

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE CANNOT BE DEEMED "HARMLESS ERROR" WHERE THE JURY HAS NOT FOUND THE OMITTED ELEMENT BEYOND A REASONABLE DOUBT 12

A. The Harmless-Error Doctrine Cannot Be Used To Supply Factual Findings On Elements That The Jury Never Considered 14

Page

B.- The Inapplicability Of Harmless-Error Review When The Jury Has Not Found Every Element Of The Offense Charged Is Fully Consistent With This Court's Other Instructional Error Decisions 27

II. THE COURT OF APPEALS WRONGLY HELD THAT OMISSION OF AN ESSENTIAL ELEMENT IS SUBJECT TO HARMLESS-ERROR REVIEW WHERE THE DEFENDANT "ADMITS" THE OMITTED ELEMENT 33

III. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT REQUIRES REVERSAL IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED. 42

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 7, 19, 22

Bollenbach v. *United States*, 326 U.S. 607 (1946) . . 16, 21

Boyde v. *California*, 494 U.S. 370 (1990) 17

Cabana v. *Bullock*, 474 U.S. 376 (1986) 13, 23

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 44

California v. *Roy*, 117 S. Ct. 337 (1996) . . . . . *passim*

Carella v. *California*, 491 U.S. 263 (1989) . . . . . *passim*

Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) . . . . . *passim*

Chapman v. *California*, 386 U.S. 18 (1967) . . . . . *passim*

Colorado v. *New Mexico*, 467 U.S. 310 (1984) 44

Connecticut v. *Johnson*, 460 U.S. 73 (1983) . . . . . *passim*

Cupp v. *Naughten*, 414 U.S. 141 (1973) 46

Davis v. *United States*, 160 U.S. 469 (1895) 13

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 14

TABLE OF AUTHORITIES — Continued

Page

Duncan v. *Louisiana*, 391 U.S. 145 (1968) . . 12, 19, 23, 43

Estelle v. *McGuire*, 502 U.S. 62 (1991) 11, 34, 35, 46

Henderson v. *Morgan*, 426 U.S. 637 (1976) . 21, 26, 34, 39

Horning v. *District of Columbia*, 254 U.S. 135 (1920) . . 39

In re Winship, 397 U.S. 358 (1970) 13, 22, 26

Johnson v. *United States*, 117 S. Ct. 1544 (1997) . . . 15, 28

Konda v. *United States*, 166 F. 91 (7th Cir. 1908) 35

Mathews v. *United States*, 485 U.S. 58 (1988) 34

McCarthy v. *United States*, 394 U.S. 459 (1969) 34

Old Chief v. *United States*, 117 S. Ct. 644 (1997) 35, 37, 38, 39

Pope v. *Illinois*, 481 U.S. 497 (1987) . . 26, 27, 28, 30, 31

Roe v. *United States*, 287 F.2d 435 (5th Cir. 1961) . . . 34

Rose v. *Clark*, 478 U.S. 570 (1986) . . . . . *passim*

Singer v. *United States*, 380 U.S. 24 (1965) 34

Sparf v. *United States*, 156 U.S. 51 (1895) 18

TABLE OF AUTHORITIES — Continued

Page

Staples v. *United States*, 511 U.S. 600 (1994) . . . . . *passim*

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

United States v. *Bayer*, 331 U.S. 532 (1947) 44

United States v. *Breitkreutz*, 8 F.3d 688 (9th Cir. 1993) . 36

United States v. *Espinoza*, 641 F.2d 153 (4th Cir.), cert. denied, 454 U.S. 841 (1981) 36

United States v. *Gaudin*, 115 S. Ct. 2310 (1995) . . *passim*

United States v. *Harding*, 491 F.2d 697 (10th Cir. 1974) 36

United States v. *Hasting*, 461 U.S. 499 (1983) 21

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 18, 19

United States v. *Muse*, 83 F.3d 672 (4th Cir.), cert. denied, 117 S. Ct. 261 (1996) 36, 37

United States v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996) 7

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TABLE OF AUTHORITIES — Continued

Page

United States v. *Thompson*, 82 F.3d 849 (9th Cir. 1996) 32

Weiler v. *United States*, 323 U.S. 606 (1945) 21

Yates v. *Evatt*, 500 U.S. 391 (1991) . . . 15,-16, 29, 30, 31

Constitutional Provisions

U.S. CONST. ART. III, § 2 1

U.S. CONST. AMEND. V 2, 22

U.S. CONST. AMEND. VI 1, 17

Statutes and Rules

18 U.S.C. § 5861(d) 4, 6, 32, 33, 46

18 U.S.C. § 5861(i) 4

18 U.S.C. § 922(o) 4

Fed. R. Crim. P. 11 . . . . . 34, 36

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TABLE OF AUTHORITIES — Continued

Page

Miscellaneous

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TABLE OF AUTHORITIES — Continued

Page

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IN THE

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OCTOBER TERM, 1996

No. 96-1279

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519. The judgment of the district court (Pet. App. 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996, and a timely suggestion of rehearing *en banc* was denied on January 6, 1997. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on February 12, 1997, and granted on May 27, 1997. 117 S. Ct. 1841. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Sixth Amendment to the United States

Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

In this case, the trial court erroneously failed to instruct the jury on an essential element (*mens rea*) of the criminal offenses with which petitioner was charged. The Eleventh Circuit acknowledged that the trial court's instructional error was of "constitutional dimension" (Pet. App. 10a), but nonetheless affirmed petitioner's convictions on the ground that the error was "harmless" — even though the jury did not find the omitted element, or the predicate facts necessary to establish that element, beyond a reasonable doubt. The court of appeals reasoned that harmless-error review was appropriate because the instructional omission involved "only one element of the crime" and because the jury "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 12a n.12. Thus, the court of appeals held, "there is a legitimate, though admittedly inchoate, adjudication of guilt upon which * * * harmless error analysis can operate." *Ibid.* Having made this threshold determination, the Eleventh Circuit concluded that the trial court's instructional error in fact was harmless because it "related to an element of the crime that the defendant in any case admitted," and because the court of appeals was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 16a, 17a.

A. Factual Background.

During the early morning of March 15, 1991, petitioner George Rogers was pulled over by a Broward County Deputy Sheriff on suspicion of driving while intoxicated, and was arrested after failing a field sobriety test. J.A. 5, 19-20.[1] In the course of a post-arrest search, the arresting officer found a .22 caliber handgun and magazine of .380 caliber ammunition in petitioner's pocket. The officer also found a .380 caliber handgun and ammunition in the front seat of petitioner's truck. In addition, behind the bench seat of the truck, the officer found a closed black bag containing a MAC-11 pistol, an unserialized silencer and other items. J.A. 62-63. The bag was not visible from the driver's seat. J.A. 63.

During a post-arrest interview (taped at petitioner's request), which was conducted at approximately 3:15 a.m., three hours after the arrest, petitioner candidly admitted possessing the .22 and .380 caliber handguns and ammunition. J.A. 29-30, 33-34. He firmly denied, however, ever possessing any of the items in the black bag, including the MAC-11 pistol and silencer, or even knowing of their existence prior to his interview. Pet. App. 3a; J.A. 30-31, 33, 51. The interviewing ATF agents nonetheless showed petitioner the items from the black bag and asked him: "[D]o you know what these are?" Petitioner responded that he could identify what the items were, including the silencer, as a result of his training with the Special Forces during the Vietnam War, but again denied any knowledge that the items had been in his truck. J.A. 33-34. A search of the National Firearms Registration and Transfer

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[1] Petitioner was tried in a state court on the offenses for which he was arrested, including driving while intoxicated and carrying a concealed weapon. He was acquitted by the jury of all charges. J.A. 22-23, 61.

Record revealed that no firearms had been registered to petitioner. Pet. App. 2a-3a.

B. Proceedings In The District Court.

1. Petitioner was charged with possession of an unregistered and unserialized silencer in violation of 18 U.S.C. §§ 5861(d) and 5861(i).[2] At trial, petitioner defended solely on the ground that he never knowingly possessed the silencer in question, and that after his experience with silencers as a member of the Fifth Special Forces Group in Vietnam, he never would knowingly possess a silencer. J.A. 32-34, 46, 64-65. Petitioner took the stand and admitted possessing the .22 and .380 caliber handguns and ammunition (J.A. 63-64), explaining that he was an avid marksman who regularly participated in riflery competitions. J.A. 64-66. Petitioner also testified that his military training enabled him to identify the item in question as a silencer. J.A. 69-70, 74-75. He consistently denied, however, ever owning or possessing any silencer since his return from the war. J.A. 65, 70, 74-75. When asked how the silencer in question got into his truck, petitioner testified: "My hand to God, I do not know what happened. I do not know how that got in my truck and I do not know what happened. I only know that it is not mine." J.A. 75-76.

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[2] Petitioner also was charged with possession of an unregistered automatic machine gun (the MAC-11 pistol) in violation of 18 U.S.C. § 922(o). However, at trial the government offered no evidence that petitioner was aware the pistol had been converted to an automatic weapon. On appeal, the government conceded that, under *Staples* v. *United States*, 511 U.S. 600, 609 (1994), petitioner's conviction for possession of the pistol should be vacated because "the government did not submit sufficient proof to the jury that appellant knew the MAC-11 had been converted from semi-automatic to fully-automatic status." U.S. C.A. Br. 5. The court of appeals agreed, holding that the "conviction on this count cannot stand" under *Staples*. Pet. App. 8a.

At trial, petitioner requested that the jury be instructed that it could find him guilty of the offenses charged only if the government proved beyond a reasonable doubt that "the defendant willfully and consciously possessed items which he knew to be 'firearms'" under the law. J.A. 12. In offering this instruction, petitioner's counsel stated that "[i]t is the law, I believe, and it is also our defense which has been made fairly clear at this point." J.A. 54. The district court denied the requested instruction. J.A. 87. Instead, the court instructed the jury that for each offense the government had to prove petitioner "knowingly possessed" the firearm in question, but specifically directed the jury that it was *not* required to find that petitioner was aware of the characteristics of the item that made it a registerable "firearm" under federal law:

> It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.* * * What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

J.A. 104. Petitioner's timely objection to this instruction was overruled. J.A. 84-87. The jury convicted petitioner on each count. J.A. 108-109.

3. After the jury rendered its verdict, the district court noted on the record that "this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously [it] was a close question for them * * *." J.A. 109. The court also noted at petitioner's sentencing hearing that "[i]t

is only about every five years or so you get a defendant takes the stand and testifies the way Mr. Rogers does, straight up, clear-cut, flat-out, no fudging or hedging, and it's always refreshing. I know the jury had trouble with their deliberations." J.A. 109. The court sentenced petitioner to time served and three years of supervised release, due in part to its finding that petitioner was "extremely distraught over his conviction and accompanying loss of civil rights." J.A. 110.

C. Proceedings In The Court of Appeals.

On May 23, 1994, six weeks after the jury verdict, this Court announced its decision in *Staples* v. *United States*, 511 U.S. 600, 609 (1994), holding that the government must prove, as an essential element of the firearms offenses involved here, that the defendant knew "the particular characteristics that make his weapon a statutory firearm." Relying on *Staples*, petitioner appealed to the Eleventh Circuit, arguing that the district court committed reversible error when it withdrew from the jury an essential element of the offenses charged. In response, the government conceded that the trial court's instruction on the silencer charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. It argued nonetheless that the instructional omission was "harmless" under *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), because "the evidence that appellant knew the nature of the silencer was unchallenged and unassailable." *Id.* at 10-11, 13.

The Eleventh Circuit affirmed. It acknowledged that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." Pet. App. 8a. The court also recognized that "the district court committed an error of

constitutional dimension when it declined to instruct the jury on an essential element of the crime." *Id.* at 10a. The only remaining issue before the court, then, was the "quite daunting task" of determining whether the error in question was amenable to harmless-error review. The court held that it was, and found the error harmless.

The court first held that the trial court's failure to instruct the jury on the essential *mens rea* element was amenable to harmless-error scrutiny on the ground that, under *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991), the error was not a "structural defect[]" which "'def[ies] analysis by "harmless error" standards.'" Rather, the court "liken[ed] the error * * * to other 'trial errors which occur 'during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evidence presented."'" Pet. App. 12a (quoting *Fulminante*, 499 U.S. at 309; *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)).

In so holding, the Eleventh Circuit expressly disagreed with the Fifth Circuit's decision in *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (1996), that instructional omissions necessarily require reversal under *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). The court distinguished the instructional omission before it from the defective reasonable doubt instruction in *Sullivan*:

> With respect, we feel that *Pettigrew* reads too broadly the basic holding of *Sullivan*. Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, *the typical instructional omission will affect only one element of the crime. Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one.* Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly

> inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

Pet. App. 13a n.12 (emphasis added).

While the court of appeals "wholeheartedly accept[ed]" the notion "that it cannot be harmless when the trial court directs a verdict [in favor of the prosecution] on an element of the crime charged," (Pet. App. 15a n.13), it disagreed that an instructional omission on an essential element is tantamount to such a directed verdict because "[i]n contrast to a directed verdict, the failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." *Ibid.*

Having found that the trial court's instructional omission was susceptible to harmless-error review, the Eleventh Circuit went on to determine whether the error was, in fact, harmless. Purporting to follow Justice Scalia's concurring opinion in *Carella* v. *California*, 491 U.S. 263, 270 (1989) (per curiam), the court of appeals stated that an instructional omission on an essential element

> may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

Pet. App. 14a-15a. The court of appeals determined that the district court's failure to instruct the jury on the *mens rea* element was harmless under the second of these "exceptions" because, in the court's view, petitioner had effectively "admitted" *mens rea* by his identification of the item in question as a silencer during his post-arrest interview and at trial:

> In his post arrest interview, which was reproduced for the jury via videotape, and again on the witness stand at trial, Rogers emphatically and without reservation admitted that he knew the item found in his truck was a silencer. * * * These unequivocal assertions convince us that this is a case in which the instructional omission related to an element of the crime that the defendant in any case admitted.

Pet. App. 16a. The court of appeals then concluded "that the constitutional error was harmless beyond a reasonable doubt, as we are certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 17a.

SUMMARY OF ARGUMENT

At issue in this case is whether it can ever be harmless error under the Constitution for a person to be convicted of an offense by a jury that has not found him guilty beyond a reasonable doubt of each and every element of that offense. The Eleventh Circuit answered this question in the affirmative, holding that the failure of the trial court to instruct the jury on an essential element of the offenses charged was subject to harmless-error review because the error involved "only one element" (Pet App. 13a n.12), and because the court viewed the element as one that petitioner had "in any case admitted." *Id.* at 16a. The court proceeded to "fill the gaps" in the jury's verdict and supplied the missing factual findings that the jury never made based on the court's "certain[ty]" that the jury's verdict would have been the same had it been properly instructed. Pet App. 17a. As we demonstrate below, the court

of appeals' decision reflects a profound disregard of the right to trial by jury and a patent misapplication of this Court's harmless-error decisions, which clearly confirm that harmless-error review is inapplicable where the jury has not rendered a verdict on every element of the offense charged.

I. Under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny, the constitutional harmless-error doctrine applies only where the jury has actually rendered a complete verdict on every element of the offense, and only then to gauge whether the constitutional error contributed to the verdict actually entered. In this case, however, the court of appeals unhinged the harmless-error doctrine, using it to actually *supply* factual findings that the jury never made concerning an element that the district court explicitly removed from the jury's consideration. Such misuse of the harmless-error doctrine cannot be reconciled with the Court's unanimous decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993), which squarely held that where a jury does not enter a complete verdict based on the instructions actually given, "the entire premise of *Chapman* review is simply absent" since "the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which the harmless-error scrutiny can operate." In this case, the court of appeals did precisely what *Sullivan* held it could not do.

II. The court of appeals tried to justify its application of the harmless-error doctrine by noting that the element in question (*mens rea*) was one that petitioner had "admitted" through statements made during a post-arrest interview and again at trial. The court of appeals searched the record for "admissions" even though the Court's "harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." *Rose* v. *Clark*, 478 U.S. 570, 583

(1986). Indeed, where an essential element has been completely removed from the jury's consideration, the fact that a defendant has provided evidence relevant to that element is constitutionally meaningless, since a defendant has the unqualified right to insist upon a jury determination of guilt, and because "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991). In this case, while petitioner made admissions relevant to the element removed by the trial court, it was still the jury's exclusive province to decide the weight of those admissions and to determine whether the prosecution proved the omitted element beyond a reasonable doubt. Under *Sullivan*, a defendant's testimonial admissions in no way justify application of harmless-error review where an essential element is omitted from the jury instructions. For even in such a case, the fact remains that "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280.

III. The court of appeals also took comfort in the fact that its intrusion into the province of the jury involved only one element of the offenses charged, and that the jury had otherwise "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. The assumption that the Constitution will tolerate a jury verdict on all elements except one, however, is plainly wrong. The Constitution guarantees "a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995) (emphasis added). By holding that the Constitution permits the harmless-error doctrine to be used to

"fill in the gaps" left open by a trial court's failure to instruct on an element of the offense, the court of appeals plainly exceeded the boundaries set by this Court in *Sullivan*.

ARGUMENT

I. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE CANNOT BE DEEMED "HARMLESS ERROR" WHERE THE JURY HAS NOT FOUND THE OMITTED ELEMENT BEYOND A REASONABLE DOUBT.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (citing 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769); 2 J. Story, *Commentaries on the Constitution of the United States* 541 n.2 (4th ed. 1873)). "It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan* v. *Louisiana*, 391 U.S. 145, 151 (1968). The right to a jury trial, in fact, is the only right proclaimed in each of the twelve state constitutions in existence prior to the Constitutional Convention and is the only guarantee to appear in both the Constitution and the Bill of Rights. A.W. Alschuler & A.G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

A criminal defendant's right to trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993).

The right is all-encompassing, "giv[ing] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin*, 115 S. Ct. at 2320 (emphasis added). As this Court held in *In re Winship*, 397 U.S. 358 (1970), "'[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged'." *Id.* at 363 (quoting *Davis* v. *United States*, 160 U.S. 469, 493 (1895)). Accordingly, "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986).

In this case, the court of appeals acknowledged these bedrock constitutional principles and agreed that petitioner's constitutional right to a jury determination of guilt or innocence was violated by the trial court's failure to instruct the jury on an essential element of the offenses charged. The court nonetheless held that this constitutional violation was subject to harmless-error analysis because it affected "only one element of the crime," and because the jury had "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. This holding misapplies this Court's harmless-error decisions, which never have countenanced a "single element" exception to the right to trial by jury. To the contrary, the Court consistently has emphasized that the harmless-error doctrine may not be used by reviewing courts to decide factual issues that the jury never considered, to supply findings of guilt that the jury never made, or to resuscitate an incomplete or fatally defective verdict.

In sum, by declaring the trial court's removal of an essential element from the jury was subject to harmless-error

review (and finding that the error was actually harmless), the court of appeals violated petitioner's constitutional right to a jury verdict on that element. It also misapplied *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny. Under the *Chapman* standard, where (as here) the jury has not rendered a complete verdict on every element of the offenses charged, the harmless-error doctrine has no application at all. The court of appeals' decision to apply that doctrine here must therefore be reversed.

A. The Harmless-Error Doctrine Cannot Be Used To Supply Factual Findings On Elements That The Jury Never Considered.

1. From its first articulation in *Chapman* v. *California*, 386 U.S. 18 (1967), the constitutional harmless-error doctrine has been carefully limited to those cases in which an otherwise valid conviction has been entered, and then only to avoid "reversal of the conviction if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As *Chapman* explained, whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 386 U.S. at 20. If the appellate court answers the first question in the negative, the error is one that cannot be harmless under the Constitution, rendering the second question unnecessary and ending the harmless-error inquiry. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

Under the principles recently expressed in *Sullivan*, the constitutional error in this case is one that cannot be declared harmless. As the Court explained, "[h]armless-error review looks * * * to the basis on which 'the jury actually rested its

verdict.'" 508 U.S. at 279 (quoting *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991)).[3] By focusing solely on the verdict actually entered by the jury,

> the question [*Chapman*] instructs the reviewing court to consider is *not* what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. * * * The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error.

Ibid. (emphasis added). It follows, then, that the harmless-error doctrine applies *only* where the jury has "actually entered" a complete guilty verdict; it is *not* a license for appellate courts to supply a verdict, or a portion thereof, that the jury never entered. As *Sullivan* put it, for an appellate court "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Ibid.*[4]

Applying these principles, *Sullivan* declared that the harmless-error doctrine has no role to play when the jury has not found every essential element of the offense charged beyond

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[3] Accord R. Traynor, *The Riddle of Harmless Error* 21 (1970) ("It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty").

[4] Thus, as the Court recently pointed out in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), where an essential element has been removed from the jury's consideration, *Sullivan* is "the case most closely on point."

a reasonable doubt — which occurred in *Sullivan* because the reasonable doubt instruction given there was constitutionally defective. In such a case, there is nothing that a reviewing court can constitutionally do that would allow it to declare such an error harmless because there never was a constitutional "verdict" in the first place:

> Since * * * there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which the harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280 (citing *Yates*, 500 U.S. at 413-414 (Scalia, J., concurring); *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)).

The foregoing principles compel the same result in this case. Here, the jury found petitioner guilty without finding an essential element of the crimes charged. The constitution, however, "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 115 S. Ct. at 2313. Without such a determination by the jury, as was the case in *Sullivan*, "there has been no jury verdict within the meaning of the Sixth Amendment." 508 U.S. at 280.

As the court of appeals' decision below highlights, without a complete verdict by the jury on every element, the *only* way that an appellate court can purport to remedy the omission of an essential element is by weighing the record evidence itself and surmising what the jury would have decided had it considered

the omitted element. Thus, the court below reviewed petitioner's trial testimony and concluded that the trial court's "instructional omission related to an element of the crime that the defendant in any case admitted," and pronounced itself that it was "certain that the verdict in this case would have been the same absent the defective instruction." Pet. App. 16a-17a. Such appellate fact-finding is precisely what the Constitution forbids in criminal cases, for it is the jury's exclusive province to decide guilt or innocence on every element of the offense charged, "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279. In short, "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, * * * it requires an actual jury finding of guilty." *Id.* at 280. See also *Boyde* v. *California*, 494 U.S. 370, 379-380 (1990) (rejecting standard requiring examination of what a reasonable juror "could" have or "would" have done). No such finding was made by the jury below.

2. For an appellate court to declare the trial court's omission of an essential element of the offense harmless error based on its view of the evidence concerning that element is tantamount to affirming a directed verdict against the defendant on that element. The Constitution forbids such usurpation of the jury's function. See *Sullivan*, 508 U.S. at 280 ("[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal").

It is axiomatic that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S.

at 277.[5] The prohibition against directed verdicts of guilt "stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases." *Rose*, 478 U.S. at 578. Thus, in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court reaffirmed the exclusive constitutional role of the jury as the finder of fact:

> In a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction.

Id. at 572-573 (citations omitted).

In this case, the district court's omission of an essential element had the same effect as a directed verdict in favor of the prosecution on that element. As Justice Powell explained, "[a] directed verdict removes an issue completely from the jury's consideration" and "permits a jury to convict a defendant 'without ever examining the evidence concerning an element of the crimes charged.'" *Connecticut* v. *Johnson*, 460 U.S. 73,

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[5] Accord, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895) ("it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged"); *id.* at 174 (Gray, J., dissenting) ("the court can never order the jury to convict, for no one can be found guilty but by the judgment of his peers"); *Connecticut* v. *Johnson*, 460 U.S. 73, 83 (1983) (plurality) ("The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict * * * regardless of how overwhelming the evidence may point in that direction'") (quoting *Martin Linen*).

95-96 (1983) (dissenting opinion). See also *Martin Linen*, 430 U.S. at 571 (a directed verdict, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"). That is precisely what occurred here. Indeed, the trial court explicitly *removed* the element of *mens rea* from the case by instructing the jury that it was *not* necessary for the prosecution to prove beyond a reasonable doubt that petitioner knew the characteristics of the item that made it a registerable "firearm." As with a directed verdict, then the omission of an essential element of the crimes charged permitted the jury to convict petitioner without ever examining the evidence to determine whether the omitted element was met.

Also, like a directed verdict, withdrawing an essential element from the jury's purview vitiates the jury's constitutional role as the finder of fact. As such, it is an error that necessarily defies measurement, and is incapable of harmless-error scrutiny. Indeed, this Court confirmed in *Rose* that

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. * * * This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. * * * Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

478 U.S. at 578 (citing *Martin Linen*, 430 U.S. at 572-73; *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408 (1947); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). See also *Arizona* v. *Fulminante*, 499 U.S. 279, 294 (1991) (White J., dissenting) (directed verdict for the State is among the

"constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error"); R. Traynor, *The Riddle of Harmless Error* 21 (1970) (same). It is for this very reason that removal of an essential element from the jury's consideration can never be regarded as harmless. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., concurring).

Indeed, it is this very principle that underlies this Court's decision in *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947). In *Carpenters*, the trial court failed to properly instruct the jury that the defendants could be found guilty of conspiracy to violate the antitrust laws only if the defendants actively participated in the conspiracy. This Court reversed the conviction, despite clear record evidence that the defendants had in fact participated in the alleged conspiracy, expressly refusing to weigh the evidence to determine whether the conspiracy element had been established:

> We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. * * * No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence.

Id. at 408-409.

Where, as here, the jury has rendered an incomplete verdict and not found the defendant guilty of every element of the offense charged beyond a reasonable doubt, there also is no room for harmless-error scrutiny. Under the harmless-error

doctrine, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (quoting *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). See also *Weiler* v. *United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility"). It makes no difference that a reviewing court may perceive the record evidence on an omitted element as "overwhelming," "because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279.[6] In short, to affirm a conviction where the jury did not

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[6] Accord, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. at 86 (plurality opinion) ("The fact that the reviewing court may view the evidence [on an element] as overwhelming is * * * simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence * * *, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made"); *United States* v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring) ("A federal appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming'"); *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) ("[i]t should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged"); *Bollenbach*, 326 U.S. at 615 ("[i]n view of the place of

render a verdict on every element beyond a reasonable doubt would squarely violate the Due Process Clause, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364.

3. Although most errors that occur during the trial process will be amenable to harmless-error scrutiny, there are certain "structural" errors that so fundamentally impair the right to a fair trial that they "defy analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 307-309, and thus "require reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. A conviction rendered without a verdict of guilty beyond a reasonable doubt on every element of the offense charged is among those errors.

In *Fulminante*, this Court "distinguished between, on the one hand, 'structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards,' and, on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'" *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499 U.S. at 307-09). An incomplete jury verdict is not attributable to the presentation of evidence. And like other errors that this Court has regarded as structural, there is nothing that a reviewing court can look to that would allow it to declare the error harmless. "The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty

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importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be").

beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280. Accord *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986) ("Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime").

As noted above, *Sullivan* held that a defective reasonable-doubt instruction could not be reviewed for harmless error because the instructional error produced an incomplete verdict that fundamentally deprived the defendant of his right to a jury determination of guilt or innocence on every element of the offense beyond a reasonable doubt:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. * * * The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 281-282 (quoting *Rose*, 478 U.S. at 577; *Duncan*, 391 U.S. at 155). Accord *Duncan*, 391 U.S. at 149 ("trial by jury in criminal cases is fundamental to the American scheme of justice"); *Carella* v. *California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (the right to a jury determination of guilt "is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges'") (quoting *Duncan*, 391 U.S. at 156).

Just like the defective reasonable doubt instruction in *Sullivan*, the trial court's explicit removal of *mens rea* from the jury's consideration below produced a constitutionally incomplete verdict. When such an error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-578. If anything, the error committed below was even *more* "structural" than that in *Sullivan*, which "neither * * * removed an element of the offense from the jury's consideration [n]or prevented the jury from considering certain evidence." *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). Here, by contrast, that is precisely what occurred.[7]

In short, *Sullivan* compels the conclusion that a trial court's omission of an essential element is a structural error because, in such a circumstance, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 578).[8] Accord *Carella*, 491 U.S. at

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[7] See G. Chernack, Note, *Silence Cannot Be Harmless: United States* v. *Rogers*, 106 YALE L.J. 2305, 2309 (1997) ("In *Sullivan*, the jury had considered all the issues but simply had not applied the proper standard; in *Rogers*, the jury failed to consider a necessary element of the offense. It is difficult to imagine why harmless-error review should be applied in the latter situation when such review is inappropriate in the former. By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

[8] See also J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819, 850 (1994) ("The very same logic in [*Sullivan*] compels the conclusion that a deprivation of the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence — rights as much a part of the Sixth

269 (Scalia, J., concurring) (where essential factual issue is omitted, "the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty'") (quoting *Rose*, 478 U.S. at 578)). The omission of an element from the jury instructions does not, in and of itself, constitute "structural error." Rather, it is the absence of an actual jury verdict on each essential element of the offense that "unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 281-282.

The court of appeals held that the error below was not structural, and distinguished the omission of an essential element from the defective reasonable doubt instruction in *Sullivan* on the ground that the jury in petitioner's case made a valid determination of guilt on all elements "save one":

> Unlike a flawed reasonable doubt instruction, which completely negates every jury finding, the typical instructional omission will affect only one element of the crime. *Thus, as in this case, the jury will have made a constitutionally valid determination of guilt on all issues save one.* Consequently, contrary to *Sullivan*, there is a legitimate, though admittedly inchoate, adjudication of guilt upon which, under appropriate circumstances, harmless error analysis can operate.

Pet. App. 13a n.12 (emphasis added). In other words, according to the court of appeals, the constitutional right to a

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Amendment's jury-trial guarantee as the right to a jury verdict of guilty beyond a reasonable doubt — constitutes structural error").

jury determination of guilt or innocence is satisfied so long as the jury considers *most* of the elements in question "save one."

This is patently wrong. It is not sufficient under the Constitution for a jury's verdict to be "close enough" or "almost complete." *Cf. Sullivan*, 508 U.S. at 278 ("[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt"). As Justice Scalia recently observed, "[a] jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element* of the crime." *California* v. *Roy*, 117 S. Ct. 337, 338 (1996) (concurring opinion) (emphasis added). A "verdict" rendered on all but one element of the offense charged is simply not a verdict recognized by the Fifth or Sixth Amendments. It is as incomplete and defective as a verdict rendered on all elements, but under the wrong burden of proof.

It necessarily follows that where an essential element is entirely removed from the jury's consideration, the error is structural, and that the harmless-error doctrine simply has no role to play. "When a court is asked to hold that an error that occurred did not interfere with the jury's ability to legitimately reach the verdict that it reached, harmless-error analysis may often be appropriate. But this principle cannot apply unless the jury found all of the elements required to support a conviction. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings." *Pope* v. *Illinois*, 481 U.S. 497, 509-510 (1987) (Stevens, J., dissenting) (cited with approval in *Sullivan*, 508 U.S. at 280) (citations omitted). To be sure, "[i]t cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged." *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring).

B. The Inapplicability Of Harmless-Error Review When The Jury Has Not Found Every Element Of The Offense Charged Is Fully Consistent With This Court's Other Instructional Error Decisions.

1. In confronting the question of whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the fundamental principle that an appellate court may not serve as the finder of fact. In *Carpenters*, for instance, the trial court misdescribed an element by failing to properly charge the jury that a labor union could only be convicted of an antitrust conspiracy only if the union actively participated in the unlawful acts in question. Because the trial court's misdescription completely foreclosed the jury's consideration of whether the defendants had actively participated in the conspiracy, the Court refused to analyze or weigh the record evidence of active participation, notwithstanding its apparent strength. 330 U.S. at 408-09. See also *supra* at 20.

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination of whether the materials at issue were obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504.

Although finding that the erroneous jury instructions were subject to harmless-error scrutiny, *Pope* is fully consistent with

the basic principle, reflected in *Carpenters*, that an appellate court may not supply a factual finding that the jury never made. As the Court explained, when determining whether to engage in harmless-error review, an appellate court in a misdescription case must determine whether "the facts that the jury necessarily found established guilt beyond a reasonable doubt." 481 U.S. at 503. What distinguished *Pope* from *Carpenters*, then, was that "the jurors [in *Pope*] were not precluded from considering" any element of the offense charged. *Ibid.* As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury actually found the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam). See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) (same). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* where the predicate facts found by the jury under the instructions actually given "are so closely related" to the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to

finding the [omitted] element." *Sullivan*, 508 U.S. at 281. As Justice Scalia explained, instructional errors concerning a particular element "can be harmless only if the jury verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." *Roy*, 117 S. Ct. at 339-340 (concurring opinion). "The error is harmless in this situation because it is beyond a reasonable doubt that the jury found the facts necessary to support the conviction." *Yates* v. *Evatt*, 500 U.S. 391, 406 n.10 (1991). On the other hand, where the erroneous instructions allow the jury to convict *without* finding "the facts necessary to support the conviction," the error is not subject to harmless-error scrutiny.

2. While analytically similar, instructional errors involving omissions, misdescriptions and presumptions will likely differ in the frequency with which they are amenable to harmless-error review — that is, in the frequency with which it can be determined that the jury actually found the element despite the error. Logically, it will be far more unlikely in the case of an omission that the jury's verdict on other elements necessarily embraced the omitted element since, by definition, the jury will have received *no* direction as to that element.

Erroneous presumptions are different. "Because a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). "When a jury is instructed to presume [an element] from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. In other words, the record may show that the erroneous presumption was unimportant in relation to everything else the jury considered on the issue in question, such that "[a] reviewing court may thus be able to conclude that the

presumption played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281 (citing *Yates*, 500 U.S. at 402-406).[9] Likewise, in the case of a simple misdescription (as in *Pope*), the erroneous instruction may be simply "superfluous" to the extent that "the predicate facts conclusively establish" the ultimate fact. See *Rose*, 478 U.S. at 580-581.

In contrast to an erroneous presumption (and many misdescriptions), however, complete omission of an element likely will deprive the jury of an opportunity to find the essential element required for conviction. As a result, it is improbable that a reviewing court will be able to determine that the jury actually found the proper element despite the instructional error — particularly where, as here, the trial court explicitly directed the jury *not* to consider that element. See G. Chernack, Note, *Silence Cannot Be Harmless: United States v. Rogers*, 106 YALE L.J. 2305, 2307 (1997) ("[e]mploying harmless error analysis when an instruction is omitted makes it impossible to determine whether a jury has found the existence of 'every fact necessary' and, even if it has, whether it has done so beyond a reasonable doubt").

The court of appeals was flatly wrong to conclude that "the failure to instruct on a particular element" in this case "[did] not completely prohibit the jury from considering evidence relevant to that issue." Pet. App. 15a & n.13. The trial court explicitly took the *mens rea* element away from the

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[9] This is why a defendant's "admission" of an element can render harmless an erroneous presumption. After hearing an unequivocal in-court admission, a jury would have no need to resort to the presumption. The compelling evidence going directly to the ultimate issue, as to which the jury has been correctly instructed, "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Connecticut* v. *Johnson*, 460 U.S. at 87.

jury, instructing the jury that "[i]t is not necessary for the Government to prove" that element. J.A. 104. There simply was "nothing in the instruction [that] would have directed the jury, or even permitted it, to consider and apply [the evidence pertaining to that element] in reaching its verdict." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). And to indulge the fiction that the jury, contrary to the trial court's instructions, nevertheless considered the omitted element "would be factually untenable * * * and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given." *Yates*, 500 U.S. at 403.[10]

Unlike the case of a flawed presumption, the presence of "overwhelming" evidence cannot mitigate a failure to instruct on an essential element, since no amount of evidence can show that the jury actually found what it was never directed to find (or, in this case, was told *not* to find). See *Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("misdescription of an element of the offense has * * * been held not curable by overwhelming record evidence of guilt") (citing *Carpenters*, 330 U.S. at 408-409). Thus, when faced with an omission in the jury instructions, a reviewing court can find that a jury found the facts establishing the omitted element only if the jury instructions *actually given* necessarily embraced the missing element. As Justice Scalia has explained, *Pope* was such a case because the jury could not have found a magazine obscene

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[10] See also Chernack, *supra*, 107 YALE L.J. at 2308 (where element is omitted from the jury instructions, "a court cannot ask what evidence the jury considered on a particular issue because the omitted instruction has made the issue irrelevant to the determination of guilt. By allowing harmless error review to take place in such cases, the court substitutes its own view for that of the jury on an issue that the jury has not even considered. Such a result directly conflicts with a fundamental longstanding constitutional protection: the prohibition on directed guilty verdicts").

under a "community" standard without also finding it obscene under a "reasonable person" standard. *Carella*, 491 U.S. at 271. In *Carpenters*, by contrast, a finding of guilt in accordance with the jury charge did not require the jury to find that the defendants actively engaged in a conspiracy beyond a reasonable doubt. *Carpenters*, 330 U.S. at 407 & n.19. Notwithstanding the apparent strength of the evidence, nothing the jury was asked to consider in *Carpenters* required it to make the requisite finding. *Id.* at 408.

In short, the focus in each of this Court's instructional error cases always has been on what the jury actually found — not on what the jury hypothetically would have found had it been instructed correctly. See *Sullivan*, 508 U.S. at 279-280. In this case, it is undisputed that the jury *never* found that petitioner possessed the *mens rea* required to prove that he committed the charged crimes. In *Staples* v. *United States*, 511 U.S. 600, 609 (1994), this Court held that the government must prove, as an essential element of a firearms offense under 18 U.S.C. § 5861(d), that the defendant knew "the particular characteristics that make his weapon a statutory firearm."[11] Here the trial court expressly instructed the jury that the prosecution was *not* required to prove that element. J.A. 104. As the government conceded below, the trial court "explicitly withdrew from the jury's consideration the issue of appellant's knowledge that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. The Eleventh Circuit also acknowledged that none of the jury's findings, alone or in combination, logically required the jury to find that petitioner knowingly possessed a "firearm," and thus "the district court's

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[11] Like the court of appeals below, other courts of appeals consistently have applied *Staples* to silencer possession offenses. See, *e.g.*, *United States* v. *Syverson*, 90 F.3d 227 (7th Cir.), cert. denied, 117 S. Ct. 435 (1996); *United States* v. *Thompson*, 82 F.3d 849 (9th Cir. 1996).

action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)." Pet. App. 8a. In other words, the omission in this case was a true one — not the sort of curable misdescription encountered in *Pope* or the erroneous presumptions in *Rose* and *Carella*.

As the Court confirmed in *Sullivan*, "a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, 'no matter how inescapable the findings to support that verdict might be.'" *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring) (quoting *Sullivan*, 508 U.S. at 279). *Sullivan* thus compels the reversal of petitioner's conviction because the jury did not find him guilty of every element of the crimes with which he was charged.

II. THE COURT OF APPEALS WRONGLY HELD THAT OMISSION OF AN ESSENTIAL ELEMENT IS SUBJECT TO HARMLESS-ERROR REVIEW WHERE THE DEFENDANT "ADMITS" THE OMITTED ELEMENT.

Although the Eleventh Circuit concluded that the trial court committed an "error of constitutional dimension" when it removed an essential element from the jury's consideration (Pet. App. 10a), the court nonetheless held that the error was harmless because it "related to an element of the crime that the defendant in any case admitted," and also because the court was "certain that the verdict in this case would have been the same absent the defective instruction." *Id.* at 16a, 17a. This holding cannot be squared with the Court's harmless-error decisions. As this Court explicitly stated in *Rose*, "our harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." 478 U.S. at 583. Indeed, a defendant's right to a jury verdict on every element is constitutionally assured regardless of whether he or she "admits" one or more of those elements.

A. Under the Constitution, a defendant who "admits" an element remains entitled to jury findings on every element of the offense charged *unless* he knowingly and intelligently waives either his right to a *trial* (through a guilty plea properly entered pursuant to Fed. R. Crim. P. 11) or his right to a *jury* (with the government's consent pursuant to Fed. R. Crim. P. 23). See *Henderson* v. *Morgan*, 426 U.S. 637, 647-648 (1976) (White, J., concurring).

A guilty plea, of course, is the least complicated means of establishing a defendant's guilt, since it represents "an admission of all the elements of a formal criminal charge." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). Yet, because a guilty plea "dispense[s] with [the] Constitutional right to a jury trial," the Constitution and the Federal Rules of Criminal Procedure impose stringent prerequisites to the entry and acceptance of such a plea. *Singer* v. *United States*, 380 U.S. 24, 34 (1965). Among other things, a guilty plea must be taken with the express mutual consent of the defendant and the Government, and must also be "approved by the responsible judgment of the trial court." *Ibid.* By contrast, an accused who (like petitioner) wishes to contest the charges against him need only enter a general plea of not guilty. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to *all* elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)) (emphasis added).[12]

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[12] See also *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961) (a "plea of not guilty puts all in issue, even the most patent truths"). As the Seventh Circuit noted almost 90 years ago, "our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones." *Konda* v. *United States*, 166 F. 91, 93 (1908).

After pleading not guilty, even a defendant who breaks down and openly admits his or her guilt on the stand is "justified * * * in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. at 87 n.16 (plurality opinion).

In sharp contrast to a guilty plea, a defendant's testimonial admissions concerning one or more elements of the charged offense in no way diminish the government's burden to prove each element beyond a reasonable doubt, or the jury's obligation to determine whether that burden has been satisfied as to each element. In *Estelle*, 502 U.S. at 69, the Court unanimously held that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." And, as Justice O'Connor also recently explained, "[a]t trial, a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element." *Old Chief* v. *United States*, 117 S. Ct. 644, 659 (1997) (dissenting opinion). Even the United States advocated this point in *Old Chief*. See Brief for the United States, *Old Chief* v. *United States* (No. 95-6556), at 22.[13]

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[13] The government did not contend below that petitioner entered a "partial" Rule 11 plea to the *mens rea* element of the crimes charged. Even if it had, as Justice O'Connor observed in *Old Chief*, this Court has never endorsed the concept of a "partial plea of guilty." 117 S. Ct. at 660 (dissenting opinion). See also E. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal*

That a defendant may make a testimonial admission concerning a fact relevant to a particular element of the crime does not mean that the trial court can constitutionally remove that element from the jury's consideration, or that the removal of that element may be declared harmless. Indeed, even if a defendant were to formally *stipulate* to an element — which petitioner clearly did not do — that element *still* would have to be submitted to the jury, since the government still would have the burden of proving that element beyond a reasonable doubt, and because the jury still would have the power to accept or reject that stipulation.[14] A stipulation merely "waives the requirement that the government produce evidence (other than the stipulation itself) to establish the facts stipulated to beyond a reasonable doubt." *United States* v. *Muse*, 83 F.3d 672, 678

Protection, 40 EMORY L.J. 341, 355 (1991) (under the Federal Rules, "the accused does not have the option of specifically admitting some elements of the offense while denying others"; he must "'confess all or deny all'"). The circuits are split on this question. Compare *United States* v. *Breitkreutz*, 8 F.3d 688, 692 (9th Cir. 1993) ("Allowing stipulations to be weighed in the Rule 403 balancing process would thus defeat the rule against partial guilty pleas in most cases"), with *United States* v. *Espinoza*, 641 F.2d 153, 161 (4th Cir. 1981) (recognizing concept of "so-called 'partial guilty plea,'" but also noting that any such plea must be "voluntarily, knowingly and intelligently entered by [the defendant]"); and *United States* v. *Harding*, 491 F.2d 697, 698 (10th Cir. 1974) ("the stipulation to obscenity is in effect a limited plea of guilty and there is no reason why this should not be permissible if it is done freely and voluntarily"). The Court need not resolve this conflict, however; for even assuming that such a plea could be tendered, the strictures of Fed. R. Crim. P. 11 still would need to be satisfied before a court could accept it. In this case, petitioner never pled guilty to any element of the offenses charged.

[14] See, *e.g.*, *United States* v. *Breitkreutz*, 8 F.3d 688, 691 (9th Cir. 1993) ("[a] stipulation is not proof"); *United States* v. *Muse*, 83 F.3d 672, 679 (4th Cir.), cert. denied, 117 S. Ct. 261 (1996) (a stipulation does not "entitle the prosecution to a directed verdict or exact the ultimate price from a defendant: a 'guilty plea' with respect to an element of the crime").

(4th Cir.), cert. denied, 117 S. Ct. 261 (1996). It also may preclude the admission of evidence concerning the stipulated element under Fed. R. Evid. 403. *Old Chief*, 117 S. Ct. at 653-655. Nonetheless, the jury still must decide whether the stipulated fact has been established beyond a reasonable doubt, and can only be instructed that it "may accept" a stipulated fact as proven. See, *e.g.*, *Muse*, 83 F.3d at 679; 1 E. Devitt *et al.*, *Federal Jury Practice and Instructions* § 12.03 (4th ed. 1992) ("you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts"). A proper instruction, then, "must clearly and unequivocally inform the jury that the government has met its burden of proving [the] element, while preserving the defendant's right to a presumption of innocence." Brief of the United States, *Old Chief* v. *United States* (No. 95-6556), at 25.

B. In this case, petitioner did not knowingly and intelligently concede *any* element of the offenses with which he was charged. Unlike the defendant in *Old Chief*, petitioner did not stipulate to *any* element. To the contrary, he insisted on a jury decision as to every element, including the element that the court of appeals found him to have admitted.

In holding that the trial court's omission of the *mens rea* element from the jury instructions was subject to harmless-error review, the court of appeals relied heavily on certain of petitioner's statements during his post-arrest interview and at trial. By those statements, however, petitioner did nothing more than admit specific facts that were introduced into evidence at trial. During his post-arrest interview (conducted at 3:00 a.m., three hours after petitioner's arrest, and again at trial, petitioner testified that he could identify a hidden item found in his truck as a silencer based upon his training with the Special Forces during the Vietnam War. J.A. 30, 65, 69-70. All the while, petitioner emphatically insisted that he would

never knowingly possess a silencer, and that he had never seen the particular silencer in question. J.A. 32-34, 46, 64-65, 93-95.

Such testimonial admissions by a defendant, whatever their nature, are simply pieces of evidence whose weight is to be determined solely by the jury. Petitioner's testimonial "admissions" were entitled to the same solemn consideration by the jury (and not an appellate court) as any other evidence in the record. Thus, the fact that admissions were made concerning a particular element did not render the omission of that element subject to harmless-error review. As the United States openly acknowledged during the oral argument in *Old Chief*, "[w]e cannot get a directed verdict no matter how overwhelming the evidence, and it is open to the defendant to invite doubt as to any piece of evidence, even his own admission." Tr. of Oral Arg., No. 95-6556 (1997 WL 605007), at *50.

By his testimony, petitioner did just what the United States in *Old Chief* acknowledged he could: "invit[ing] doubt" as to evidence bearing on the element of *mens rea*. Petitioner defended against the government's charges by denying that he ever knowingly possessed the silencer in question, and by insisting that he would never knowingly have anything to do with such an item. J.A. 32, 46, 65. Consistent with this defense, petitioner's counsel twice requested that the jury be instructed that petitioner could be found guilty of the offenses charged only if the government proved beyond a reasonable doubt that "the defendant knew th[e] items in question were firearms" under the law. J.A. 12, 83-84. Without that instruction, petitioner's counsel feared that the jury could mistakenly believe that possession of a statutory "firearm" was essentially a strict liability offense. J.A. 54. The district court, ruling without the benefit of *Staples*, refused the requested instruction and charged the jury that the government was *not*

required to prove the petitioner's awareness of the characteristics of the items that made them registerable "firearms" under the law. J.A. 104. The trial court thus deprived petitioner of his constitutional right to have the jury decide whether the evidence adduced at trial by the Government — including his own testimonial admissions — established all of the elements of the offenses charged beyond a reasonable doubt. See *Gaudin*, 115 S. Ct. at 2320.

Because petitioner never entered a guilty plea or waived his right to a jury trial, "the best that can be said for the judgment of conviction entered against the defendant is that it rests on strong evidence never presented to a trier of fact." *Henderson*, 426 U.S. at 650 (White, J., concurring). Juries have the power to conclude that even "strong evidence" does not meet the constitutionally required "beyond a reasonable doubt" standard. This, too, the United States acknowledged in *Old Chief*. See 1997 WL 605007, at *52 ("no matter how overwhelming the evidence, we can always be nonsuited by a jury that has any doubt on any reason, even an irrational one"). Thus, even where the evidence appears entirely one-sided, the jury still has "the power to bring in a verdict in the teeth of both law and facts." *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.).

C. The court of appeals nevertheless justified its invocation of harmless-error review by citing to Justice Scalia's statement in his *Carella* concurrence that an instruction erroneously establishing a conclusive presumption can be harmless if it relates to an "element of the crime that the defendant in any case admitted." 491 U.S. at 270 (Scalia, J., concurring) (citing *Connecticut* v. *Johnson*, 460 U.S. at 87). The court of appeals' reliance on *Carella* is clearly misplaced, transforming an opinion that resoundingly rejects appellate fact-finding into one that would embrace it. *Carella* involved an incorrect instructional *presumption* — not a missing element. The *Carella*

jury, notwithstanding the error, was at least instructed on each of the required elements of the charged offense. In his concurring opinion, Justice Scalia observed that this Court's plurality opinion in *Connecticut* v. *Johnson*

> determined — I think correctly — that the use of conclusive presumptions could be harmless error only in those "rare situations" when "the reviewing court can be confident that [such an] error did not play any role in the jury's verdict." * * * The opinion mentioned as among those "rare situations" an instruction establishing a conclusive presumption on a charge of which the defendant was acquitted (and not affecting other charges), *and an instruction establishing a conclusive presumption with regard to an element of the crime that the defendant in any case admitted.*

491 U.S. at 270 (emphasis added).

The reasons why a defendant's admission could be significant in a defective presumption case are absent when an element has been wholly omitted. In a case like *Carella*, an unequivocal in-court admission may render a defective presumption harmless only because it is reasonable to believe that such compelling evidence going directly to the "ultimate fact" rendered the presumption superfluous. In that instance, then, a reviewing court could conclude that the jury in fact made the requisite findings concerning the element in question because it was instructed generally as to the necessity of finding that element. An admission in such circumstances renders an instructional error harmless *not* because the admission can substitute for a missing jury finding, but because it "sufficiently reduc[es] the likelihood that the jury applied the erroneous instruction" at all. *Johnson*, 460 U.S. at 87. See also *id.* at 94 (Powell, J., dissenting) ("where intent to kill is conceded — as

where self-defense is pled — there would be no occasion to give a *Sandstrom* instruction").

It is quite another thing for a reviewing court to hold that the complete *omission* of an essential element can be declared harmless because the defendant, by his testimony, effectively admitted that element. The difference is that in the case of an omission, it is the reviewing court — and *not* the jury — that assesses the evidentiary weight of the defendant's admission. Indeed, for an appellate court to declare that the omission of an element was harmless because the defendant "admitted" that element would be no different than holding that the omission may be harmless because the evidence on that element was "overwhelming" — a result squarely forbidden by *Sullivan*. As Justice Scalia explained:

> A defendant may assuredly insist upon observance of [the jury trial] guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. That is also why in [*Carpenters*] the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy — regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella, 491 U.S. at 268-69 (Scalia, J., concurring) (citations omitted). In short, because the trial court below completely omitted the essential element of *mens rea* from the jury's consideration, the fact that petitioner made testimonial admissions relevant to that element is constitutionally irrelevant

for purposes of determining whether the court's constitutional error is subject to harmless-error scrutiny.

III. FAILURE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT REQUIRES REVERSAL IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED.

A. The court of appeals believed it was entitled to "fill in the gaps" left open by a trial court's instructional errors based on its "certain[ty]" that the jury's verdict "would have been the same absent the defective instruction." Pet. App. 17a. If upheld, such unprecedented use of the harmless-error doctrine would substantially and inexorably erode the Constitution's explicit jury trial guarantees. For this reason, it is imperative that the right to have "a jury determine, beyond a reasonable doubt, [a person's] guilt of every element of the crime with which he is charged" (*Gaudin*, 115 S. Ct. at 2320) be rigidly enforced without exception — regardless of whether the trial court omits one, two or more of the elements of the offense charged.

Sullivan is the touchstone here because of its explicit rejection of "earlier cases embracing the idea that the harmlessness of an error may be gauged simply through an appellate court's own assessment of guilt." H.T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1201 (1996). Yet, notwithstanding *Sullivan's* unambiguous command, appellate courts have continued to use harmless-error review as a means of affirming the convictions of those persons whom the reviewing courts believe to be guilty. As Chief Judge Edwards explained, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost

automatically where the proof of a defendant's guilt seems strong." *Id.* at 1170.

This Court observed in *Duncan* v. *Louisiana* that the right to trial by jury embodies "a profound judgment about the way in which law should be enforced and justice administered," with the jury serving as a structural safeguard "to prevent oppression by the Government" and to ensure "community participation in the determination of guilt or innocence." 391 U.S. at 155, 156. The Court also acknowledged the "impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court." *Id.* at 153-54. Indeed, the right to a jury determination of guilt or innocence has long been regarded an essential safeguard against "the tyranny of popular magistrates in a popular government" (A. Hamilton, Federalist No. 83 (C. Rossiter ed. 1961)), and "'a sacred part of our legal privileges.'" *Gaudin*, 115 S. Ct. at 2315 (quoting 1 S. Smith & T. Lloyd, *Trial of Samuel Chase* 34 (1805)).[13]

As first-hand observers of the trial process itself, jurors are uniquely suited to make the countless credibility and other factual determinations that are crucial to a fair and reliable assessment of guilt or innocence. Appellate judges, by contrast, necessarily are limited to a "dead" record, and thus are ill-equipped to resolve factual controversies or to make credibility

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[13] See also G. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1366 (1994) ("The defendant's Sixth Amendment right to a jury verdict dictates adoption of the harmless-error test that best limits appellate-level intrusion on the jury's factfinding role. It is worth remembering that if a court finds an error harmful, the remedy is a new trial, not a permanent release. Reversal for harmful error means only that the defendant will have a second chance at a fair result by a fair process").

determinations. As Justice Stevens put it, trial "testimony and accompanying exhibits are much more difficult to assimilate and fully comprehend from the cold record than in the living trial, and of course we do not have the opportunity to make assessments of the demeanor of the witnesses." *Colorado* v. *New Mexico*, 467 U.S. 310, 326 (1984) (dissenting opinion). See also *Caldwell* v. *Mississippi*, 472 U.S. 320, 330 (1985) ("an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record"); *United States* v. *Bayer*, 331 U.S. 532, 536-537 (1947) ("[h]ow far any charge on technical questions of law is really understood by those of lay background would be difficult to ascertain, but it is certainly more evident in the living scene than in a cold record").[16]

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[16] See also Edwards, *supra*, 70 N.Y.U. L. REV. at 1193-1194 ("The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make * * * guilt determinations. An appellate judge's view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility"); G. Mitchell, *supra*, 82 CAL. L. REV. at 1340, 1353 ("appellate-level factfinding is undesirable for two reasons. First, it places the appellate court in the position of trier of fact, a role traditionally reserved for the jury. This undermines the jury's function as the conscience of the community and intrudes on the Sixth Amendment right to trial by jury. Second, it allows appellate judges, who are poorly situated to make any factual determination, to decide the ultimate fact: whether the defendant is guilty or not guilty. * * * Review of an antiseptic record removes appellate judges from the emotion and intensity that may be crucial to understanding and weighing of testimony. It is impossible to capture in a transcript all of the characteristics of a witness that go to her credibility").

To preserve the sanctity of the jury as the exclusive finder of fact, the line establishing the respective domains of the judge and jury in the process of adjudicating guilt must be rigidly observed without regard to the perceived weight of the evidence. Indeed, if appellate courts are given any latitude at all to review the record to "fill the gaps" in a jury verdict, as "minor" as those gaps may seem, there will be no principled means of preventing the complete erosion of the right to trial by jury.

In this case, the court of appeals took comfort in the fact that its intrusion into the realm of the jury involved *only* one element of the offenses charged, and that the jury had otherwise "made a constitutionally valid determination of guilt on all issues save one." Pet. App. 13a n.12. Yet, if it is permissible for a reviewing court to overlook the omission of one element, why not two, or even three? What principled difference could there possibly be? There is, of course, none at all. Blackstone warned long ago that any "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, *though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" 4 W. Blackstone, *Commentaries on the Laws of England* 344 (1769) (emphasis added). Blackstone's admonition illustrates the fatal flaw in the Eleventh Circuit's decision, and poignantly demonstrates that the right to trial by jury is itself at stake where, as here, an appellate court purports to make a seemingly "minor" incursion into the constitutional domain of the jury. Despite the seemingly seductive logic of declaring harmless the removal of an essential element from the jury so long as an appellate court is "convinced" that the defendant admitted it — and so long as only one element is involved — the magnitude of the constitutional violation is the same, since the inescapable fact will remain that the "wrong entity" has judged the defendant guilty.

B. The facts of this case also demonstrate the folly of allowing reviewing courts to declare harmless the omission of elements that the jury never considered. For even where a defendant has made testimonial admissions concerning those elements, there is no reliable way of determining what the jury would have decided had it been instructed to consider the omitted element. For instance, the trial judge here explicitly stated that this was a "difficult" case in which the "jury had trouble with their deliberations" (J.A. 109), and in which petitioner's defense focused exclusively on the elements of knowledge and *mens rea, i.e.*, that he did not, and never would have, knowingly possessed a silencer because of his experiences with such items during the Vietnam War.

"It is well established that [a challenged] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)). In this particular instance, and as this Court's decision in *Staples* v. *United States*, 511 U.S. 600 (1994), reflects, the element omitted by the trial court was a critical one that could have proven decisive in the jury's deliberations. By telling the jury that the government was not required to prove that the defendant knowingly possessed a firearm within the meaning of the law, the jury easily could have believed that possession of an unregistered or unserialized silencer was a strict liability offense. Indeed, that is precisely why this Court held that *mens rea* (or as this Court described it, a "guilty mind") was required to establish a "firearms" possession offense under 18 U.S.C. § 5861(d). 511 U.S. at 607 n.3.

The trial court below observed that this was "a difficult decision for" the jury and that there were "a number of jurors in there, frankly, wiping away tears." J.A. 109. As the trial court simply put it, "the jury had trouble with their deliberations." *Ibid.* Given that petitioner's defense centered

around his knowledge and state of mind and his unequivocal denial of guilty knowledge, and because the government's case on knowledge was entirely circumstantial, it is not at all unlikely that a sympathetic jury "trouble[d] with [its] deliberations" might have acquitted petitioner if instructed that it could only convict him if it found beyond a reasonable doubt that he had a "guilty mind" and intended to commit a wrongful act.

In the end, however, whether the giving of a *Staples* instruction would have made a difference is a question that no reviewing court can ask, let alone answer, under the Constitution. Indeed, regardless of any admissions that petitioner may have made, the undeniable fact remains that there was no verdict here "upon which harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280. Thus, to affirm such a conviction under the harmless-error doctrine would mean that "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578.

Since *Chapman* v. *California*, this Court has emphasized its commitment to the principle that it can never be harmless for a person to stand convicted of a crime when the jury has not found every element of the offense charged beyond a reasonable doubt. The Court should now confirm that that is indeed where the constitutional line has been drawn, and hold that the court of appeals crossed it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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No. 96-1279

In the Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

47PP

QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Summary of argument	12
Argument	15
I. Instructional omissions or misdescriptions of one element of an offense are "trial errors" subject to harmless-error review, not "structural errors" categorically immune from such review	16
II. The *Staples* error in this case was harmless	21
A. A defendant may not challenge his conviction on the ground that the jury was given an inadequate opportunity to reject his own sworn testimony on an uncontested issue	21
B. Petitioner's unequivocal admissions at trial were coextensive in scope with the limited scienter element erroneously omitted from the jury instructions	38
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	12, 16, 18, 27, 35
Bailey v. *United States*, 116 S. Ct. 501 (1995)	23
Bollenbach v. *United States*, 326 U.S. 607 (1946)	25
Brady v. *Maryland*, 373 U.S. 83 (1963)	26
Cabana v. *Bullock*, 474 U.S. 376 (1986)	17
California v. *Roy*, 117 S. Ct. 337 (1996)	18, 19, 20, 23, 25

Cases—Continued: Page

Carella v. *California*, 491 U.S. 263 (1989) 11, 14, 17, 19, 20, 30
Cavender v. *Cavender*, 114 U.S. 464 (1885) 36
Chapman v. *California*, 386 U.S. 18 (1967) 21, 24, 27
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 14, 29, 30, 31, 32
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 12, 24, 26, 34-35
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 35, 37
Estelle v. *McGuire*, 502 U.S. 62 (1991) 33
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 16
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 15
Hennessy v. *Goldsmith*, 929 F.2d 511 (9th Cir. 1991) 12
Horning v. *District of Columbia*, 254 U.S. 135 (1920) 14, 36, 37
Johnson v. *United States*, 117 S. Ct. 1544 (1997) 15, 17, 18
Kotteakos v. *United States*, 328 U.S. 750 (1946) 27
Krzeminski v. *Perini*, 614 F.2d 121 (6th Cir.), cert. denied, 449 U.S. 866 (1980) 29, 30
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 16
McNally v. *United States*, 483 U.S. 350 (1987) 23-24
Motes v. *United States*, 178 U.S. 458 (1900) 14, 22, 27, 28, 29, 32, 33, 35
Nix v. *Whiteside*, 475 U.S. 157 (1986) 35-36
Pope v. *Illinois*, 481 U.S. 497 (1987) 17, 18, 20, 26
Rose v. *Clark*, 478 U.S. 570 (1986) ..... *passim*
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 29
Staples v. *United States*, 511 U.S. 600 (1994) 9, 10, 12-13, 15, 23, 39, 40
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 11, 16, 17, 18, 22, 24, 26, 37
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 35
Tumey v. *Ohio*, 273 U.S. 510 (1927) 16

Cases—Continued: Page

United Bhd. of Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) 25
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989) 39
United States v. *Aramony*, 88 F.3d 1369 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997) 18
United States v. *Bagley*, 473 U.S. 667 (1985) 26
United States v. *Corso*, 20 F.3d 521 (2d Cir. 1994) 9
United States v. *Gaudin*, 515 U.S. 506 (1995) 15, 20, 23, 35, 37
United States v. *Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984) 8-9
United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) 23
United States v. *Lopez*, 100 F.3d 98 (9th Cir. 1996), cert. denied, 117 S. Ct. 1824 (1997) 18
United States v. *Maloney*, 71 F.3d 645 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996) 18
United States v. *Mechanik*, 475 U.S. 66 (1986) 22, 34
United States v. *North*, 910 F.2d 843, modified, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991) 30
United States v. *Palmieri*, 21 F.3d 1265 (3d Cir.), vacated and remanded, 513 U.S. 957 (1994) 9
United States v. *Thomas*, 116 F.3d 606 (2d Cir. 1997) 36
United States v. *Vasquez*, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973) 8
United States v. *Washington*, 705 F.2d 489 (D.C. Cir. 1983) 36
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 16
Waller v. *Georgia*, 467 U.S. 39 (1984) 16, 37
Weiler v. *United States*, 323 U.S. 606 (1945) 21, 25
Yates v. *Evatt*, 500 U.S. 391 (1991) 17, 25, 28, 30, 32

Constitution, statutes and rule: Page

U.S. Const. Amend. VI (Confrontation Clause) 26
Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (repealed 1948) 27
18 U.S.C. 922(o) 2, 4, 10
18 U.S.C. 924(c)(1) 23
18 U.S.C. 2113 23
26 U.S.C. 5845(a) 5, 7, 9, 18
26 U.S.C. 5861 ..... 5, 9, 15, 39
26 U.S.C. 5861(d) 2, 5, 10
26 U.S.C. 5861(i) 2, 5, 10
26 U.S.C. 5871 2
28 U.S.C. 2111 27
Fed. R. Crim. P. 52(a) 27

Miscellaneous:

Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167 (1995) 28
9 *Wigmore on Evidence* (Chadbourn rev. ed. 1981) 33

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. A petition for rehearing was denied on January 6, 1997. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on February 12 and was granted on May 27, 1997, limited to the question set forth in the Court's order. 117 S. Ct. 1841. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of knowingly possessing a machinegun, in violation of 18 U.S.C. 922(*o*) (Count 1);[1] one count of knowingly possessing a silencer not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d) (Count 2); and one count of knowingly possessing a silencer that lacked a serial number, in violation of 26 U.S.C. 5861(i) (Count 3). He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. See Pet. App. 6a. The court of appeals reversed petitioner's conviction for possessing a machinegun, but affirmed his other convictions. *Id.* at 1a-17a.

1. a. Just after midnight on March 15, 1991, a deputy sheriff in Broward County (Florida) saw petitioner driving his pickup truck erratically and instructed him to pull over to the side of the road. After charging him with drunk driving and resisting arrest, the officer searched petitioner and, in his pockets, found a .22 caliber handgun with matching ammunition as well as a magazine of .380 caliber ammunition for a different gun. The officer then searched petitioner's truck. Under a baseball cap resting on the front passenger seat, the officer found a .380 caliber "Beretta" pistol loaded with another

[1] The indictment printed in the Joint Appendix is the original indictment, which charged petitioner, in Count 1, with possession of an unregistered machinegun in violation of 26 U.S.C. 5861(d) and 5871. J.A. 6. The superseding indictment amended that language to charge petitioner with possession of a machinegun in violation of 18 U.S.C. 922(o).

round of ammunition. The Beretta was outfitted with a "flash suppressor," which is designed to suppress the flash of a gunshot to conceal its location. Elsewhere in the pickup truck, the officer discovered ammunition for a third gun: a Colt 10 mm. semiautomatic weapon. Pet. App. 2a; Tr. 117-122, 140-141.

Finally, behind the driver's seat, the officer found a black tool case containing one more gun—a .380 caliber MAC-11—along with seven rounds of ammunition, another flash suppressor, and a silencer. Tr. 123-131, 142. The MAC-11, originally manufactured as a semiautomatic weapon, had been manually converted into a fully automatic machinegun. Tr. 174-175. The silencer, which fit the barrel of that machinegun, was later tested and found to be fully functional. J.A. 23-25. It did not have a serial number and had not been registered in the National Firearms Registration and Transfer Record. Pet. App. 2a-3a.

b. That same night, after being advised of his rights, petitioner agreed to be interviewed by several federal and local law enforcement agents. At his request, the interview was taped. Petitioner acknowledged ownership of the .22 caliber pistol and the .380 caliber Beretta. J.A. 29-30. The agents then presented petitioner with the items found in the tool case and asked him whether he knew what they were. He identified each with confidence and precision:

> [Petitioner]: * * * I definitely know what they are.
>
> [Agent]: You do.
>
> [Petitioner]: Yes sir.
>
> [Agent]: Okay, what are they?

[Petitioner]: One is a, that is a .380, I think a MAC.

[Agent]: Okay.

[Petitioner]: And the other is a, that is a silencer.

See J.A. 30; see also J.A. 34 (readily identifying smaller objects taken from tool case as "baffles for a silencer"). Volunteering that he "kn[e]w the law" forbidding unauthorized possession of silencers and automatic weapons, J.A. 45-47; see also J.A. 65, petitioner disclaimed ownership of those items but could not explain how they had come to be in his truck, J.A. 31.

During the same interview, petitioner displayed an unusual familiarity with silencers. At one point, he offered: "If you want to ask me how to make a silencer, I'll tell ya. You get, you get a god damn oil filter, that's the best silencer you can get. Don't they teach you that in, in, in Special Forces? That's what they taught me." J.A. 33; see also J.A. 42 ("You know, you want a silencer, you, you, you get a, what's the best silencer. * * * [I]t's, it's a two liter bottle. I mean everybody knows that[.]"); J.A. 46 ("I could make silencers, for Christ's sake, I could do, I could do anything."). Asked how he knew so much about silencers, petitioner answered that, in addition to his Special Forces training, "I studied. * * * In fact, if you probably go to my house now there's a book on silencers," J.A. 36, "[s]ome screwball book that I bought at a gun show," J.A. 42.

2. a. It is unlawful, except in limited circumstances not applicable here, "for any person to * * * possess a machinegun." 18 U.S.C. 922(*o*). Similarly, it is

unlawful to possess unregistered or unserialized items that, like silencers, fall within the specialized definition of "firearm" contained in 26 U.S.C. 5845(a). See 26 U.S.C. 5861(d) and (i).[2] Petitioner was indicted under those provisions for unauthorized possession of a machinegun (Count 1), for possession of an unregistered silencer (Count 2), and for possession of a silencer with no serial number (Count 3).

At trial, the government elicited the testimony of, among other witnesses, the deputy sheriff who had searched petitioner's pickup truck and of firearms experts who confirmed that both the silencer and the machinegun found in the truck were fully functional. See J.A. 23-27. The government also played for the jury the tape recording of petitioner's interview, including the portions in which petitioner had identified the silencer as a silencer. J.A. 28-51.

Petitioner testified in his own defense. On direct examination, he denied that the silencer and machinegun were his, but he reaffirmed his expertise with such devices:

Q. Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A. This is a silencer, yes. I know exactly.

---

[2] Section 5861 provides that "[i]t shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or * * * (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter." Section 5845(a) provides that "[t]he term 'firearm' means * * * (7) any silencer (as defined in section 921 of title 18, United States Code)."

J.A. 69-70. Later, on cross-examination, petitioner reiterated that he had known what the silencer was the moment it was first shown to him on the night of his arrest:

> Q. And you also know exactly what this [the silencer] is the moment —
>
> A. I've used those silencers in Vietnam, yes, sir.
>
> Q. The moment Agent Armstrong showed it to you during your interview you said, "Oh, I know exactly what this is."
>
> A. Absolutely.
>
> * * * * *
>
> Q. * * * [Y]ou knew exactly what [the silencer baffles] were the moment they were shown to you?
>
> A. Absolutely, sir. When you depend [for] your life on silencers you know how to take them apart and work on them, you know their elements.

J.A. 74-75.

Petitioner's counsel focused his closing argument on the claim that the government had failed to prove that the machinegun and the silencer belonged to petitioner or that he had known they were in his truck. J.A. 90-98. In the course of that argument, however, petitioner's counsel reaffirmed petitioner's

sworn testimony that he knew exactly what those items were:

> They make, Government makes a big deal about the fact that [petitioner] readily is able to identify and explain what all these items are. * * * [S]ure, he knows what silencers are. Big deal. He knows what automatic weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes he knows what they are and he honestly said, "Yes, I know what they are," and expends [*sic*] what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

J.A. 94-95.

b. After the close of evidence, the district court told the jury that a silencer is a "firearm" within the specialized definition of 26 U.S.C. 5845(a). It then instructed that, to find petitioner guilty on Count 2 for possessing an unregistered silencer, the jury had to find, among other things, "[t]hat [petitioner] knowingly possessed a 'firearm,' as defined above." J.A. 104. The court added:

> It is not necessary for the Government to prove that [petitioner] knew that the item described in the indictment was a "firearm" which the law requires to be registered. * * * What must be proved beyond a reasonable doubt is that [petitioner] knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered[.]

Ibid. The court issued a similar instruction with respect to Count 3, which charged petitioner with possessing a silencer without a serial number.[3]

Petitioner had earlier asked the court to instruct the jury that the government was required to prove, not just that he had knowingly possessed certain items and that those items were "firearms" within the statutory definition, but also that he "knew [them] to be 'firearms'" when he possessed them. J.A. 12. Put another way, petitioner asked for an instruction requiring the government to prove that he had known that his machinegun was a machinegun and that his silencer was a silencer.[4] Relying on circuit precedent, the district court denied the motion. J.A. 86 (citing *United States* v. *Vasquez*, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973)); see also *United States* v. *Gonzalez*, 719 F.2d 1516,

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[3] The court instructed that, to find petitioner guilty on Count 3, the jury had to find: (1) "[t]hat [petitioner] * * * knowingly possessed a 'firearm,' as defined above," (2) "[t]hat the 'firearm' had no serial number," and (3) "[t]hat [petitioner] knew that the firearm had no serial number." J.A. 105. With respect to Count 1, which charged petitioner with possession of a machinegun, the court instructed that the government was required to prove: (1) that petitioner possessed the gun identified in the indictment, (2) that the gun "was a machinegun," and (3) that "such possession was knowing." J.A. 103.

[4] See J.A. 54-55 (argument by petitioner's counsel: "They have to establish the person knew it was a firearm and they had to know that it existed. They *didn't* have to know that it was unregistered or the government does *not* have to prove that the defendant knew it was supposed to be registered.") (emphasis added); J.A. 84 ("the government is required to prove that the defendant knew that items in question were 'firearms under Act[,]' not that items in question were 'firearms within general meaning of the term'").

1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). At the time of trial, the majority of federal circuits had held that, in prosecutions under Section 5861 for possession of unregistered "firearms," the government was not required to prove that a defendant knew that the item in his possession had all of the characteristics that made it a "firearm" within the meaning of Section 5845(a). See *Staples* v. *United States*, 511 U.S. 600, 636-637 & nn.22-23 (1994) (Stevens, J., dissenting); *United States* v. *Palmieri*, 21 F.3d 1265, 1273-1274 & nn.7-9 (3d Cir.) (discussing case law), vacated and remanded, 513 U.S. 957 (1994); *United States* v. *Corso*, 20 F.3d 521, 526-527 (2d Cir. 1994) (same).

c. The jury found petitioner guilty on all three counts. Tr. 406. In so doing, it found beyond a reasonable doubt that he had possessed, and had known that he possessed, the items in his black tool case, including the silencer.

3. After the jury had returned its guilty verdict, and shortly before the district court entered final judgment, this Court decided *Staples*. The defendant in that case was convicted under Section 5861 of possessing an unregistered weapon that had originally been manufactured as a semiautomatic rifle but had later been converted—according to the defendant, without his knowledge—into a fully automatic machinegun. 511 U.S. at 603. This Court held that the district court had erred in failing to require the government to prove that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id.* at 602. The *Staples* decision does not, however, require the government to prove that a defendant had knowledge that the law requires

registration of "firearms," see *id.* at 638 (Stevens, J., dissenting), or that the defendant knew that his "firearm" was in fact unregistered, see *id.* at 608-609 (majority opinion).

On petitioner's appeal, the government conceded that *Staples* required reversal of petitioner's conviction on Count 1 for possession of a machinegun under Section 922(*o*), because the evidence at trial had not established that petitioner knew that the MAC-11, originally manufactured as a semiautomatic weapon, had been modified to act as a fully automatic machinegun. The court of appeals agreed and reversed petitioner's conviction on that count. Pet. App. 7a-8a. Petitioner also relied on *Staples*, however, to argue that his convictions on Counts 2 and 3 were invalid because, although the jury found that he had knowingly possessed the items in his black tool box, the district court had not told the jury that, to return a guilty verdict on those counts, it also had to find that he knew that the silencer was a silencer.

The court of appeals agreed with petitioner that, under *Staples*, the district court's instructions had "effectively omitted * * * an essential element" of the offense set forth in Section 5861(d). Pet. App. 8a; see also *id.* at 8a n.8 (assuming *arguendo* that *Staples* applies to offenses under Section 5861(i)). The court held, however, that the omission was harmless error. The court first rejected petitioner's argument that the omission of an element from jury instructions is a "structural error" that is immune from harmless-error analysis. See *id.* at 10a-12a. Instead, the court held, such errors are appropriately characterized as "trial errors," which "occur during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evi-

dence presented." *Id.* at 12a (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (internal quotation marks omitted)).

The court of appeals then considered what methods of harmless-error analysis would be appropriate for determining whether this *Staples* error was in fact harmless. Relying on the concurring opinion in *Carella* v. *California*, 491 U.S. 263, 267-273 (1989) (Scalia, J., concurring in the judgment), the court held:

> [A]n instructional omission * * * may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) *Where the omission related to an element of the crime that the defendant in any case admitted*; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

Pet. App. 14a-15a (emphasis added). The court held that "the facts of this case fall squarely within the second category" because, both in his post-arrest interview and on the witness stand at trial, petitioner had "emphatically and without reservation admitted that he knew the item found in his truck was a silencer," an admission that his own attorney had "reiterated" during closing argument. *Id.* at 16a. Given those "unequivocal assertions" of knowledge, the court concluded, the instructional error had not contributed to the guilty verdict, and the error was therefore harmless beyond a reasonable doubt. *Id.* at

17a. The court added that reversal in these circumstances would require "a quixotic exercise of form over substance." *Ibid.* (quoting *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991)).

4. This Court granted certiorari limited to the following question: "Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." 117 S. Ct. 1841 (1997).

SUMMARY OF ARGUMENT

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted); accord *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991); *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). The question presented here is whether that doctrine and its underlying rationale permit a reviewing court to affirm a conviction where the jury instructions erroneously omitted an element of an offense, but the defendant in any event admitted that element in open court. The answer to that question is yes: as this Court's precedent confirms, a defendant may not challenge his conviction on the ground that the jury was given an inadequate opportunity to reject the truth of his own unequivocal testimony on an uncontested issue.

The district court's error—a failure to instruct the jury on a knowledge element subsequently recognized by this Court in *Staples* v. *United States*, 511 U.S. 600

(1994)—is properly characterized as "trial error," which is amenable to harmless-error review, rather than "structural error," which is not. In a variety of contexts, this Court has recognized that errors affecting a single element in a trial court's jury instructions are susceptible to harmless-error analysis. That principle is applicable where the jury instructions correctly set forth all of the elements of an offense but one. In that context, the jury has returned a guilty verdict, and the single-element error neither pervaded the trial nor forecloses accepted methods of harmless-error review. At bottom, petitioner's claim is not that a *Staples* error is "structural" and immune from such review, but that the court of appeals used an improper method of harmless-error analysis in finding this particular error harmless.

Petitioner's argument on that point rests on two essential premises: first, that reliance on the strength of the evidence, even when overwhelming and uncontested, is never an appropriate method of determining that an instructional omission (or misdescription) of a single element is harmless, and, second, that a defendant's unequivocal, sworn admissions at trial are "simply pieces of evidence" for harmless-error purposes. Although it is far from clear that there is a categorical prohibition on the use of "overwhelming evidence" in harmless-error review of single-element instructional omissions—particularly in cases where there was, and could be, no dispute about the element at trial—this Court need not reach that issue here. That is because petitioner's attempt to equate a defendant's own admissions with other kinds of overwhelming evidence is inconsistent with the principle, first recognized by

this Court nearly 100 years ago, that sworn admissions made *by* a defendant at trial differ both in kind and in consequence from overwhelming evidence introduced *against* that defendant by the prosecution.

As that precedent confirms, "[i]t would be trifling with the administration of the criminal law" (*Motes* v. *United States*, 178 U.S. 458, 476 (1900)) to invalidate a defendant's conviction based on a failure to instruct the jury on an uncontested element that he admitted in open court: that error could be "of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty," *id.* at 475, so long as the jury found the other elements satisfied, which this jury did. See also *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring in the judgment); *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (opinion of Blackmun, J.). Reversal in those circumstances would vindicate no cognizable individual right and no valid societal purpose.

In his own testimony, echoed by argument of counsel, petitioner unequivocally admitted the only element that the district court erroneously omitted from its instructions—his knowledge that the silencer found in his truck was, in fact, a silencer—and, by its verdict, the jury found that petitioner had knowingly possessed that item. Because a *Staples* instruction in this case would not have affected a rational jury's determination that petitioner was guilty, his position ultimately reduces to the claim (see, *e.g.*, Br. 39) that the district court's error compromised the jury's nullification power. Even if a defendant could ever legitimately complain on appeal about impairment of the jury's "power to bring in a verdict in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920), however, this jury's nullification power was not in fact impaired: The single-element instructional error at issue here had no bearing on the jury's ability or inclination to exercise that power on petitioner's behalf.

ARGUMENT

In failing to instruct the jury on the issue of petitioner's knowledge that his silencer was a silencer—an element of the offense under Section 5861, see *Staples* v. *United States*, 511 U.S. 600 (1994)—the district court committed error. See generally *United States* v. *Gaudin*, 515 U.S. 506 (1995).[5] The issue in this case, however, is not whether the district court committed error, but whether that error compels the reversal of petitioner's conviction. "We agree that the determination of guilt or innocence * * * is for the jury rather than the court. Harmless-error analysis addresses a different question: what is to be done about a trial error that * * * in practice clearly had no effect on the outcome?" *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986) (citation omitted). That inquiry has two aspects: first, whether instructional omissions (or misdescriptions) of one element of an offense are amenable to harmless-error review at all, and second, if so, whether the error in this case was in fact harmless in view of petitioner's admission of the omitted element in open court. We address the first issue in Point I below and the second in Point II.

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[5] That is so even though *Staples* had not yet been decided at the time of trial and controlling Eleventh Circuit precedent (see pp. 8-9, *supra*) foreclosed such an instruction. See *Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997); *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

I. INSTRUCTIONAL OMISSIONS OR MISDESCRIPTIONS OF ONE ELEMENT OF AN OFFENSE ARE "TRIAL ERRORS" SUBJECT TO HARMLESS-ERROR REVIEW, NOT "STRUCTURAL ERRORS" CATEGORICALLY IMMUNE FROM SUCH REVIEW

1. In any criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. at 579. In particular, "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). This Court has distinguished between two general classes of constitutional error: "structural defects in the constitution of the trial mechanism," which are categorically immune from harmless-error review, and "error[s] in the trial process itself," which are subject to such review. *Id.* at 309, 310; see *id.* at 306-310 (collecting cases). Unlike "trial errors," "structural errors" generally affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Id.* at 309-310. This Court has recognized only a handful of errors as structural. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

In a variety of contexts, the Court has consistently treated the type of error at issue here—errors in jury instructions involving a single element of an offense—as trial errors that are subject to harmless-error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404-405 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. at 580 (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense); see also *id.* at 504 n.7 (rejecting the contrary dicta in *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986), on which petitioner relies (Br. 13)). For example, where a jury is erroneously instructed to presume an ultimate fact that constitutes an element of the offense from specified predicate facts, that error is nonetheless harmless if "no rational jury could find those [predicate] facts without also finding that ultimate fact," because, in that context, "making those findings is functionally equivalent to finding the element required to be presumed." *Sullivan*, 508 U.S. at 281; see also *Carella*, 491 U.S. at 266. That particular method of harmless-error analysis is not limited to erroneous presumptions; it should also apply to instructions that either inaccurately describe an element or omit it entirely.[6] In such cases,

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[6] In *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), the Court declined to decide whether the omission of an element could be harmless error, but noted that "[i]t is by no means clear" that a single-element omission "fits within th[e] limited class" of structural errors, because such an omission "can just as easily be analogized to improperly instructing the jury on an element of the offense, * * * an error which is subject to harmless-error analysis," *id.* at 1550 (citing *Yates*, *Carella*,

the jury's findings on other elements or other counts may constitute the "functional equivalent" of the omitted or misdescribed element, thereby clearly rendering the error harmless. See, *e.g.*, *California* v. *Roy*, 117 S. Ct. 337, 339-340 (1996) (Scalia, J., concurring); *United States* v. *Lopez*, 100 F.3d 98, 102-105 (9th Cir. 1996), cert. denied, 117 S. Ct. 1824 (1997); *United States* v. *Aramony*, 88 F.3d 1369, 1383-1385 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *United States* v. *Maloney*, 71 F.3d 645, 657-658 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996).

Because at least one form of harmless-error analysis is available here, the *Staples* error in this case—the district court's failure to instruct the jury that, to convict, it had to find that petitioner knew that his silencer was a silencer—is properly characterized as a trial error, subject to harmless-error review, rather than a structural error, categorically immune from such review. A *Staples* error does not infect "[t]he entire conduct of the trial from beginning to end" or "the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. at 309-310. Instead, it removes only one element from the jury's consideration; the jury must otherwise consider the evidence and, before returning a guilty verdict, must determine that the defendant possessed the item in question, that he knew he possessed it, and that the item was in fact a "firearm" within the definition of 26 U.S.C. 5845(a). Like other types of instructional errors, such an error can be harmless if, for example, a jury's findings on the other elements or counts are "functionally equivalent" to the finding required

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Pope, and *Rose*), "as it can be to failing to give a proper reasonable-doubt instruction altogether," *ibid.* (citing *Sullivan*).

under *Staples*.[7] Regardless of the number of additional circumstances in which a *Staples* error can be harmless—and whether or not it is harmless where, as here, it concerns "an element of the crime that the defendant in any case admitted," *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment)—the potential for such an error to be harmless on a particular trial record demonstrates that it is not an error "of the structural sort that def[ies] analysis by harmless error standards." *California* v. *Roy*, 117 S. Ct. at 339 (internal quotation marks omitted).

2. Although petitioner acknowledges that "[t]he omission of an element from the jury instructions does not, in and of itself, constitute 'structural error,'" Br. 25, and although he suggests that such errors could sometimes be harmless, see Br. 27-29, he nonetheless contends that the district court's error in this case *was* structural and that "the harmless-error doctrine simply has no role to play," Br. 26. Petitioner seeks to reconcile those two apparently contradictory propositions by redefining the district court's "error" as "the absence of an actual jury

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[7] For example, the "functional equivalence" analysis would render a *Staples* error harmless if a defendant were convicted on a charge of personally manufacturing and selling silencers in volume (or of conspiring to do the same): no "rational juror could plausibly * * * f[i]nd" (*Carella*, 491 U.S. at 270-271 (Scalia, J., concurring in the judgment)) the facts necessary for conviction without also finding that the defendant knew that his products were silencers. Similarly, in this case, if the district court had given a *Staples* instruction on Count 2 but not on Count 3, a conviction on the former count would embrace the functional equivalent of a finding on the element omitted from the instructions on the latter count.

verdict on each essential element of the offense." Br. 25.

This Court, however, has begun its harmless-error analysis in analogous cases by identifying the "error" at issue as the omission or misdescription of an element in the jury instructions, and that course is appropriate here as well.[8] Because such an error can be harmless in at least some cases, see pp. 17-19 & n.7, *supra*, a single-element instructional error is not structural error. The issue then presented is whether, in a particular case, the error is in fact harmless as determined by an appropriate *method* of harmless-error analysis. At bottom, petitioner's submission is that the court of appeals employed an *improper* method of such analysis to deem the *Staples* error in this case harmless.

That court found the error harmless on the ground that "the omission related to an element of the crime that the defendant in any case admitted." Pet. App. 14a (citing *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment)). Petitioner's essential argument is that reliance on a defendant's unequivocal, sworn admission at trial is no more appropriate a method of finding an instructional omission harmless

[8] See, *e.g.*, *California* v. *Roy*, 117 S. Ct. at 339 (identifying "specific error at issue here" as "an error in the instruction that defined the crime" (*i.e.*, trial court's failure to instruct on "intent or purpose" in addition to "knowledge")); *Pope*, 481 U.S. at 501 (identifying error as "[t]he instruction at issue in this case," which inaccurately described element, and holding that defendants' convictions "are subject to salvage if the erroneous instruction is found to be harmless error"); see also *Gaudin*, 515 U.S. at 526 (Rehnquist, C.J., concurring) ("the Court has subjected jury instructions plagued by constitutional error to harmless-error analysis").

than would be an appellate court's "resol[ution of] conflicting evidence" to affirm a conviction on the ground that, in all likelihood, "the defendant was guilty." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945). Petitioner's attempted equation of those two very different modes of review is mistaken, as we discuss below. But his argument on that point confirms that the issue in this case is the proper methodology for determining whether a single-element instructional error may be harmless on a particular record. When that is the issue, the error in question is not a structural error, but a trial error, and the ultimate question is whether "the error complained of * * * contribute[d] to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

II. THE *STAPLES* ERROR IN THIS CASE WAS HARMLESS

A. A Defendant May Not Challenge His Conviction On The Ground That The Jury Was Given An Inadequate Opportunity To Reject His Own Sworn Testimony On An Uncontested Issue

Petitioner claims that his conviction must be reversed because the district court did not instruct the jury to "find" what he had sworn was true: that he knew his silencer was a silencer. That claim rests on two propositions: that evidence, no matter how incontrovertible and undisputed, can never "mitigate a failure to instruct on an essential element," Br. 31, and that personal admissions made by a defendant in his testimony "are simply pieces of evidence" for harmless-error purposes, Br. 38. As we discuss below, this Court's decisions do not conclusively resolve the proper role of "overwhelming evidence" in

harmless-error review of single-element instructional errors where the element at issue is not reasonably subject to dispute and was essentially uncontested at trial. This case presents no need to resolve that issue, however, because, for harmless-error purposes, sworn admissions made *by* a defendant at trial differ both in character and in consequence from "overwhelming evidence" introduced *against* a defendant by the prosecution. As this Court declared nearly 100 years ago, see *Motes* v. *United States*, 178 U.S. 458 (1900), a defendant may not seek invalidation of his conviction, and burden the criminal justice system with the "substantial social costs" of a retrial, see *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986), solely by complaining that his jury was given an inadequate opportunity to reject the truth of his sworn testimony on an uncontested issue.

1. In advocating an absolute prohibition on any use of "overwhelming evidence" to find an instructional omission harmless, petitioner relies principally on this Court's statement in *Sullivan* v. *Louisiana* that "[t]he inquiry * * * is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." 508 U.S. at 279. *Sullivan* involved a flawed reasonable-doubt instruction that "vitiate[d] *all* the jury's findings" and therefore fell within the limited category of "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Id.* at 281 (emphasis in original; internal quotation marks omitted). *Sullivan* did not involve the distinct type of error at issue here: an instructional omission (or misdescription) of a single element of an offense,

which neither "vitiates all the jury's findings" nor "defies analysis by harmless-error standards." See Point I, *supra*; *California* v. *Roy*, 117 S. Ct. at 338-339. Petitioner nonetheless argues that *Sullivan*'s preclusion of reliance on "overwhelming evidence" as a method of harmless-error review of a defective reasonable-doubt instruction applies equally where only one element of the offense is omitted or misdescribed.

At some point, this Court may need to decide whether incontrovertible evidence introduced against a defendant on an uncontested element may serve as a basis for finding an instructional omission or misdescription of that element to be harmless error. That issue arises principally in two settings. First, a court may occasionally overlook or misstate an instruction on a relatively straightforward and technical element of an offense, where the proof on that element is beyond question and the issue is not one that defense counsel seeks to address. See, *e.g.*, *United States* v. *Johnson*, 71 F.3d 139, 142-144 (4th Cir. 1995) (reversing armed robbery conviction under *Sullivan* because the judge had instructed the jury, based on undisputed facts, that a credit union was federally insured for purposes of 18 U.S.C. 2113). Second, the applicable law governing jury instructions may change when this Court rejects lower court precedent defining the elements of an offense;[9]

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[9] See, *e.g.*, *Staples*, *supra* (adding knowledge element); *Bailey* v. *United States*, 116 S. Ct. 501 (1995) (overturning circuit precedent concerning element of "using" a firearm in connection with a drug offense under 18 U.S.C. 924(c)(1)); *Gaudin*, *supra* (overturning circuit precedent holding that materiality element of false-statement and perjury offenses was issue for trial court, rather than jury, to decide); *McNally* v.

a particular defendant may anticipate this Court's ruling and raise an objection to the instructions, even while making clear that, as a tactical matter, he has no interest in contesting the evidence on that issue at trial.

As an original matter, it is sensible to regard "overwhelming evidence" introduced against a defendant in those circumstances as an appropriate basis for finding a single-element instructional omission (or misdescription) "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. There is undoubtedly "error" in such cases. But where the trial record shows that the element in question was overwhelmingly established and essentially undisputed, and where the jury had a fair opportunity to consider the remaining elements, affirmance on harmless-error grounds would preserve "public respect for the criminal process," *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986), without impairing a defendant's underlying right to a jury trial in any meaningful respect.

It is true that language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on "overwhelming evidence" to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error. See, *e.g.*, *Sullivan*, 508 U.S. at 280 (error cannot be deemed harmless where "[t]he most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable

United States, 483 U.S. 350 (1987) (overturning circuit precedent on the intangible rights theory under the mail fraud statute).

doubt"); *Yates*, 500 U.S. at 404 ("[T]he issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt."); see also *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring) ("The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise.").[10] But other decisions have acknowledged that, at least in some contexts, a

[10] Petitioner cites several pre-*Chapman* decisions of this Court for the proposition that overwhelming evidence can never render harmless an instructional omission or misdescription of a single element of an offense. Language in some of those decisions supports that proposition, but the elements at issue in those cases were contested and possibly outcome-determinative. See, *e.g.*, *United Bhd. of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408-409, 411-412 (1947) ("the necessity * * * for an instruction [on agency issue] is apparent" because, given the parties' varying degrees of involvement in the charged conduct, "the verdict might have resulted from the incorrect instruction," and, even with respect to the defendants who did not object at trial, reversal was required because "[t]he erroneous charge was on a vital phase of the case"); *Bollenbach* v. *United States*, 326 U.S. 607, 613-614 (1946) (because an erroneous instruction in response to a jury question concerning "a basic issue" in the prosecution resolved a seven-hour jury deadlock within five minutes, "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous [instruction] given them as a guide"); *Weiler*, 323 U.S. at 611 ("We are not authorized to * * * resolve conflicting evidence[] and reach the conclusion that the error was harmless because we think the defendant was guilty."). In any event, none of those decisions reversed a conviction for failure to give an accurate jury instruction on an element that the defendant affirmatively *admitted* at trial.

reviewing court may take into account what the jury necessarily would have found if improperly excluded evidence had been admitted or if incorrect instructions had been correct. See *Pope*, 481 U.S. at 503 & n.6 ("[I]f a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."); *Delaware* v. *Van Arsdall*, 475 U.S. at 684 (Confrontation Clause violations are subject to harmless-error analysis that requires reviewing court to "assum[e] that the damaging potential of the [erroneously denied] cross-examination were fully realized" and then surmise hypothetical effect on jury); see also *United States* v. *Bagley*, 473 U.S. 667, 674-675 (1985) (test for materiality of wrongly withheld exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), is whether, *if* it had been disclosed and introduced, "the suppressed evidence *might have* affected the outcome of the trial") (emphasis added); see generally *Sullivan*, 508 U.S. at 284 (Rehnquist, C.J., concurring) ("[A]ny time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict.").

This case, however, does not require the Court to determine whether, or when, reliance on "overwhelming evidence" presented by the government could be an appropriate method of conducting harmless-error review of an instructional omission (or misdescription) of an element. Even if that method of harmless-error review were categorically improper, petitioner is mistaken in contending that a defendant's sworn admissions in court "are simply pieces of evidence" (Br. 38) for harmless-error purposes. For nearly a century, this Court's harmless-error precedent has distinguished between evidence introduced against a defendant by the prosecution and testimonial admissions made by a defendant on the witness stand. That precedent, and the principles underlying it, make clear that the instructional error in this case was harmless in light of petitioner's admission of the omitted element.

2. In 1919, Congress enacted the first harmless-error statute expressly permitting the federal courts of appeals to disregard trial errors that "do not affect the substantial rights of the parties." Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (repealed 1948); see also 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). As this Court explained in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the new law was designed to ensure that "men fairly convicted" would not benefit from "the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect." *Id.* at 760. Not until 1967, however, did the Court conclusively reject the argument that errors affecting a criminal defendant's constitutional rights are categorically immune from harmless-error review. See *Chapman*, 386 U.S. at 22; see also *Arizona* v. *Fulminante*, 499 U.S. at 306 ("most constitutional errors can be harmless"); *Rose* v. *Clark*, 478 U.S. at 579 ("if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis").

Long before *Chapman* and 19 years before the enactment of the harmless-error statute, however, this Court decided *Motes* v. *United States*, 178 U.S. 458 (1900). In that case, the Court reversed the

conspiracy convictions of several defendants, charged with murdering a federal informant, on the ground that the government had unconstitutionally introduced the prior statements of a prosecution witness who, through the government's fault, was unavailable at trial. *Id.* at 471-474. At the same time, in what has been called "[t]he sole case in which the Supreme Court even arguably applied the harmless-error rule to a constitutional violation prior to 1967,"[11] the Court upheld the conviction of defendant Columbus Motes because, unlike his co-defendants, he had taken the stand at trial and admitted that he had participated in the murder.

In finding the error harmless, the Court did not examine "whether the jury actually rested its verdict" (*Yates*, 500 U.S. at 404) on Motes' self-incriminating testimony or instead on the improperly admitted statements. Without considering the actual effect of those statements on the jury, the Court explained that, in and of itself, Motes' admission sufficed to justify his conviction: "[I]n [Motes'] own testimony enough was stated to require a verdict of guilty as to him, even if the jury had disregarded [the improperly admitted] statements altogether." 178 U.S. at 475-476. In so ruling, the Court did not purport to announce or follow a general rule of harmless-error review, for at the time there was no clear authority permitting such review of any constitutional error. The Court instead based its decision on the special status of sworn admissions by a defendant at trial: "It would be trifling with the

[11] Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1175 n.22 (1995).

administration of the criminal law to award [Motes] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 476.

More recently, in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), this Court divided evenly on whether, as a general matter, an appellate court may engage in harmless-error review of a jury instruction erroneously stating that, on the element of intent, "every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 78 (opinion of Blackmun, J.);[12] see generally *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (holding that such instructions violate due process). Although Justice Blackmun's plurality opinion would have held that such an error ordinarily requires automatic reversal, despite overwhelming evidence of guilt on the issue of intent, 460 U.S. at 86, the plurality nonetheless recognized that such an instruction "may be harmless if the defendant conceded the issue," *id.* at 87.[13] Simi-

[12] Because he would have decided the case on different grounds, Justice Stevens did not address that issue. See 460 U.S. at 88-90 (concurring in the judgment). In *Rose* v. *Clark*, 478 U.S. at 579-580, this Court resolved the issue and held that erroneous single-element instructional presumptions are amenable to harmless-error review.

[13] As an example of such a case, the plurality cited *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.), cert. denied, 449 U.S. 866 (1980), which had held harmless a trial judge's erroneous instruction barring the jury from returning an outright acquittal of a murder defendant. See *id.* at 124-125. The *Krzeminski* court based that ruling on the defendant's testimonial admissions and his decision, at trial, to seek either an insanity verdict or a conviction on a lesser crime rather than an outright acquittal; thus, "[t]he only effect of the

larly, in his separate opinion in *Carella* v. *California*, Justice Scalia would have narrowly limited the categories of cases in which "conclusive presumptions could be harmless error," but he specifically included in that category cases involving "a conclusive presumption with regard to an element of the crime that the defendant in any case admitted." 491 U.S. at 270-271 (concurring in the judgment); see also *United States* v. *North*, 910 F.2d 843, 893-894 (under analysis set forth in *Carella* concurrence, instructional omission of element was harmless "in light of North's own testimony" at trial acknowledging fact at issue), modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

Those more recent opinions establish that even those Justices who would generally reverse for *Sandstrom* error despite "overwhelming" evidence on the issue of intent, see *Connecticut* v. *Johnson*, 460 U.S. at 86 (opinion of Blackmun, J.); see also *Yates*, 500 U.S. at 413-414 (opinion of Scalia, J., joined by Blackmun, J.), nonetheless recognize that a defendant's admissions at trial occupy a category separate from "overwhelming evidence" for purposes of harmless-error review.[14] Relying on a passage in

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judge's instruction that the jury could not acquit the defendant was to minimize the possibility of jury nullification." *Id.* at 125.

[14] Petitioner suggests (Br. 10, 33) that, in *Rose* v. *Clark*, 478 U.S. at 583, this Court indicated that a defendant's concessions are irrelevant to harmless-error analysis. That is incorrect. *Rose* clarifies that a defendant's concession of an issue is not a *necessary* condition for a determination that an error on that issue was harmless, see *ibid.*, but it casts no doubt on the common-sense proposition that a concession can be a *sufficient* condition for such a finding.

Justice Blackmun's opinion in *Connecticut*, however, petitioner seeks to discount the significance of that distinction outside the *Sandstrom* context. Within that context, petitioner argues, an admission constitutes "such compelling evidence going directly to the 'ultimate fact'" that it "render[s] the [conclusive] presumption superfluous," because it *actually causes* any given jury to disregard the presumption. Br. 40 (citing 460 U.S. at 87 (opinion of Blackmun, J.)); see also Br. 30 n.9.[15] That empirical inference, petitioner continues, is unavailable where the district court omitted an element from its instructions, because in that context it is indisputable that the jury did not *actually* address the omitted issue. Therefore, petitioner concludes, an admission makes *Sandstrom* error harmless but cannot make an instructional omission harmless.

By attributing the special status of testimonial admissions to a supposed empirical effect on actual jury deliberations, petitioner would supplant the more natural explanation for that status: namely, that no sensible system of criminal justice would permit a defendant to challenge his conviction on the ground that the jury lacked an adequate opportunity for repudiating his own sworn testimony on an un-

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[15] Justice Blackmun wrote: "In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless." 460 U.S. at 87. Justice Blackmun added, however: "We leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." *Ibid.*

contested issue. See *Motes*, 178 U.S. at 476; see generally pp. 34-38, *infra*. But petitioner's explanation fails even on its own terms, because it cannot explain why an admission as to intent would render *Sandstrom* error harmless. Justice Blackmun himself believed that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue" because "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of deciding the issue based on the facts. 460 U.S. at 84-85; see also *Yates*, 500 U.S. at 414 (opinion of Scalia, J.) (criticizing majority for conducting "hypothetical inquiry" into "whether, if the jury *had been* instructed correctly, it *would have* found" the defendant guilty nonetheless). There is no obvious reason why a jury confronted with both an admission and "the functional equivalent of a directed verdict" would consider the admission and ignore the court's instruction. Moreover, even if an admission *actually* causes a jury to disregard "the functional equivalent of a directed verdict" in the court's instruction, that would not explain why (as proposed by Justices Scalia and Blackmun) a defendant's admissions should occupy a unique status, for harmless-error purposes, apart from all other forms of "compelling evidence" (Pet. Br. 40). Ordinary "compelling evidence"—*e.g.*, videotapes of a crime—may in fact have no less "compelling" an effect on a jury's actual deliberations than an admission.

For those reasons, any distinction between admissions and "overwhelming evidence" for harmless-error purposes cannot rest on empirical inferences about what a jury "actually" considered. It must rest instead on the principle, recognized in *Motes*, that

sworn admissions at trial differ from "overwhelming evidence" not just in degree, but also in kind. When a defendant admits an element in his own testimony, an instructional error on that element is harmless not because of the admission's imagined effect on the actual jury deliberations, but because "[i]t would be trifling with the administration of the criminal law" (*Motes*, 178 U.S. at 476) to reverse a conviction because the jury did not formally ratify what the defendant had sworn was true.

That principle does not presuppose that a defendant's admission "waives" his right to a jury trial on the admitted issue.[16] A defendant's not-guilty plea puts in issue all elements of an offense and requires the government to prove those elements to the jury beyond a reasonable doubt, see Pet. Br. 34-35; *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991), no matter what the defendant admits in his testimony. Thus, petitioner observes, "even if a defendant were to formally *stipulate* to an element * * * that element *still* would have to be submitted to the jury, since the

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[16] In the civil context, some courts, but not all, have held that a party's testimonial admissions are equivalent to formal "judicial admissions" such that they *prohibit* that party from contradicting the substance of the admissions with later evidence and sometimes *compel* a directed verdict in favor of the opposing party on the admitted issue. See generally 9 *Wigmore on Evidence* § 2594a (Chadbourn rev. ed. 1981). Courts that have rejected that rule would, by definition, treat testimonial admissions as equivalent to ordinary "pieces of evidence" (cf. Pet. Br. 38) that can be rebutted and that do not compel withholding the entire issue from the jury. But whether testimonial admissions should be treated like other evidence for *those* purposes has no bearing on how they should be treated for harmless-error purposes.

government still would have the burden of proving that element beyond a reasonable doubt." Br. 36.

But that point has no bearing on the special significance of a defendant's admissions in harmless-error review. "We agree that the determination of guilt or innocence * * * is for the jury rather than the court," but "[h]armless-error analysis addresses [the] different question" of whether a conviction must be reversed for an error that "clearly had no effect on the outcome." *Rose* v. *Clark*, 478 U.S. at 582 n.11. A trial court's underlying duty to instruct on every element, a duty that federal and state trial judges can be expected to honor in good faith, is fully consistent with the remedial principle that a defendant should not receive an appellate windfall if he admitted at trial an element that the jury was not formally instructed to "find." Cf. *Mechanik*, 475 U.S. at 73 (even though procedural error in grand-jury proceedings generally could not be remedied until after trial, conviction necessarily renders that error harmless, and "the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict" for prophylactic reasons).

3. The distinct status of admissions within this Court's harmless-error jurisprudence reflects the importance of practical judgment—of common sense—in harmless-error review of defects in the submission of a case to the jury. "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475

U.S. at 681 (citation omitted); accord *Arizona* v. *Fulminante*, 499 U.S. at 308; *Rose* v. *Clark*, 478 U.S. at 577. That focus on "underlying fairness" reveals why, when a defendant unequivocally admits an element at trial, the failure to instruct the jury on that element, while error, see *Gaudin*, 515 U.S. at 522-523, is harmless.

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975); accord *Duncan* v. *Louisiana*, 391 U.S. 145, 155-156 (1968). But those concerns cannot help petitioner, because at trial he himself, rather than the prosecution, introduced the "evidence" at issue, and he swore that that evidence, his own unambiguous testimony, was true. The instructional omission was therefore "of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty," *Motes*, 178 U.S. at 475, so long as the jury found the other elements satisfied, which it did.

Petitioner's invocation of the jury's unique competence to "make * * * countless credibility and other factual determinations" (Br. 43) is likewise misplaced. In citing that concern, he can mean no more than this: that his conviction should be invalidated because the jury was not told that it could acquit him if it found that he had (inexplicably) perjured himself when he testified that he knew the silencer was a silencer. That argument, like the similar argument rejected in *Motes*, "trifl[es] with the administration of the criminal law." 178 U.S. at 476; cf. *Nix* v. *Whiteside*, 475

U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."); *Cavender* v. *Cavender*, 114 U.S. 464, 471 (1885) ("[I]t does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly.").

4. Finally, petitioner suggests that, whether or not the error in this case could have affected a rational jury's determination of guilt or innocence, it denied him the benefit of the jury's "power to bring in a verdict in the teeth of both law and facts." Br. 39 (quoting *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920)). As an initial matter, that suggestion rests on the premise that juries have a right, as opposed to an unreviewable power, to disregard "both law and facts" in acquitting a defendant. But juries have no such right: "[T]he power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997); accord *United States* v. *Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law.").

Even if judicial interference with a jury's nullification power could sometimes support a defendant's claim to reversal, however, it could not do so here, for the error at petitioner's trial had no bearing on the jury's power or inclination to nullify. The case was in fact submitted to the jury. If the jury had wished to

acquit petitioner "in the teeth of both law and facts" —out of sympathy for him or disagreement with federal firearms law or for some other reason—it had the opportunity and an uncompromised power to do so. There is no rational basis for suggesting that the jury would have been more or less likely to exercise that power if it had been instructed that, to return a guilty verdict, it also had to find what petitioner had admitted: that he knew his silencer was a silencer.

If a defendant were to admit every element of his offense at trial and then, in outright disregard of established legal rules, the district court were to enter a judgment of conviction without submitting the case to the jury at all, reversal would be warranted. Despite the admission, a flagrant and complete abrogation of the jury's role in the criminal process (cf. *Sullivan*, 508 U.S. at 281; *Rose* v. *Clark*, 478 U.S. at 578) would require some appellate remedy to vindicate society's "insistence upon community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156; cf. *Waller*, 467 U.S. at 49 & n.9 (violation of public-trial right causes "great, though intangible, societal loss," and defendant need not "prove specific prejudice in order to obtain relief") (internal quotation marks omitted).[17]

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[17] On the one occasion in which this Court has addressed what "amounted to" a directed guilty verdict on a charge that the defendant entirely admitted, *Horning*, 254 U.S. at 138, the Court deemed any error harmless because "on the facts admitted there was no doubt of his guilt," *id.* at 139. In *Gaudin*, this Court stated that *Horning* has been "repudiated," and characterized it as an "anomaly," in light of later decisions (not involving admissions) that indicate that it is error, and not harmless, "for a trial judge effectively to order the jury to convict." 515 U.S. at 520. The single-element instructional

But that extreme scenario bears no resemblance to this case. Petitioner received a fair trial, full jury consideration of his defense, and a formal jury verdict on every element except the one that he admitted under oath. The district court omitted that element from its instructions only because it was bound by controlling pre-*Staples* circuit law. J.A. 86. A reversal in these circumstances could vindicate no individual right and no public purpose.

B. Petitioner's Unequivocal Admissions At Trial Were Coextensive In Scope With The Limited Scienter Element Erroneously Omitted From The Jury Instructions

Although petitioner no longer explicitly denies that he admitted the knowledge element omitted from the jury instructions, compare Pet. 21 n.10, he nonetheless suggests that his admission did not cover and establish that element, despite this Court's contrary premise in granting certiorari, see 117 S. Ct. 1841 (1997). Specifically, petitioner contends (Br. 41) that "the trial court below completely omitted the essential element of *mens rea* from the jury's consideration," and that his in-court admissions were merely "relevant to that element." See also Br. 11, 30-31, 36-38, 46. Neither of those propositions is accurate: the district court did not "completely omit" the "element of *mens rea*," and petitioner's unequivocal admissions were not just "relevant to," but coextensive in scope with, the limited scienter element that the district court did omit. Accordingly, on the facts of this case, the *Staples* error at trial was harmless.

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error in this case, however, does not remotely resemble the wholesale directed verdict at issue in *Horning*.

The district court expressly instructed the jury on the only "*mens rea*" element of Section 5861 that petitioner did not admit at trial: that the government was required to show his *knowing* possession of the items found in the black tool case in his pickup truck, one of which was a silencer. See pp. 7-8, *supra*. In finding petitioner guilty, the jury found, beyond a reasonable doubt, that petitioner did knowingly possess those items.

In *Staples*, this Court recognized an additional scienter element: a defendant's knowledge that "the weapon he possessed had the characteristics that brought it within the statutory definition" (511 U.S. at 602) of, for example, a "machinegun" or "silencer." *Staples* itself involved a semiautomatic weapon that had been converted into a fully automatic machinegun. The Court's decision rested largely on a concern that, because the difference between the two kinds of weapons is not obvious on sight, Congress could not have "intended to subject * * * law-abiding, well-intentioned citizens" to punishment if "what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." *Id.* at 615 (quoting *United States* v. *Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989) (en banc)).

But knowledge of a weapon's characteristics is the only scienter element that *Staples* requires and that the district court's instructions omitted. The government was *not* required to prove that petitioner knew that the law requires "firearms" to be registered (even though he did know that, see J.A. 45-47, 65) or that he knew that his "firearm" was in fact unregistered. See *Staples*, 511 U.S. at 608-609; see also *id.*

at 638 (Stevens, J., dissenting) (noting that "even petitioner does not contend that the Government must prove guilty intent or intentional wrongdoing," and discussing scienter requirements that are and are not required under *Staples*).

In short, despite his contrary suggestion (*e.g.*, Br. 41-42), petitioner's unequivocal admissions at trial were coextensive in scope with the only scienter element erroneously omitted from the instructions. Petitioner testified under oath that he "[a]bsolutely" knew "exactly" what the silencer was the moment he saw it. J.A. 75. The defense did not subsequently seek to retract, clarify, or impeach that testimony. Indeed, in requesting the instruction at issue here, petitioner's counsel acknowledged that his client had testified that "he knew it was a silencer and that they're bad, yes, sir, he certainly said that," while arguing only that petitioner "didn't say he knew it should be registered," J.A. 87, a fact the government is not required to prove. And, during closing argument, petitioner's counsel reaffirmed: "[S]ure, he knows what silencers are. Big deal." J.A. 94; see also pp. 5-7, *supra*. Given those admissions, no rational juror could have found that petitioner had knowingly possessed the item in question—a finding that this jury made—without finding that he had also known that what he possessed was a silencer. And no valid purpose would be served by ordering a new trial on the theory that petitioner was denied the opportunity to place his fate in the hands of a jury and to insist that the government prove its case. Petitioner had exactly that opportunity at his first jury trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General
LOUIS M. FISCHER
Attorney

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

25pp

TABLE OF CONTENTS

Page

I. FAILING TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CANNOT BE "HARMLESS" WHERE IT RESULTS IN AN INCOMPLETE JURY VERDICT 3

A. The Government's Arbitrary "One Element" Exception Is Contrary To This Court's Harmless-Error Decisions 4

B. The Applicability Of The Harmless-Error Doctrine To A Particular Error Depends Upon The Nature of The Error, Not The Strength Of The Evidence 8

II. OMISSION OF AN ESSENTIAL ELEMENT IS IMMUNE FROM HARMLESS-ERROR REVIEW EVEN IF THE DEFENDANT "ADMITS" THE OMITTED ELEMENT 10

III. OMISSION OF AN ESSENTIAL ELEMENT CANNOT BE SUBJECT TO HARMLESS-ERROR REVIEW IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 8, 11

Boyde v. *California*, 494 U.S. 370 (1990) 18

Cabana v. Bullock, 474 U.S. 376 (1986) 16

California v. *Roy*, 117 S. Ct. 337 (1996) . . 3, 5, 9, 10, 20

Carella v. *California*, 491 U.S. 263 (1989) . . 2, 6, 12, 19

Carpenters & Joiners v. *United States*,
330 U.S. 395 (1947) 2, 7

Chapman v. *California*, 386 U.S. 18 (1967) 8, 12

Connecticut v. *Johnson*, 460 U.S. 73 (1983) 4, 12

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 10

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 19

Estelle v. *McGuire*, 502 U.S. 62 (1991) 12, 17

Gangi v. Fradus, 227 N.Y. 452,
125 N.E. 677 679 (1920) 15, 16

Hall v. United States, 93 F.3d 1337 (7th Cir. 1996) . . . 15

Keller v. United States, 58 F.3d 1194 (7th Cir. 1995) . . 13

TABLE OF AUTHORITIES — Continued

Page

Kercheval v. United States, 274 U.S. 220 (1927) 14

Motes v. United States, 178 U.S. 468 (1900) 10, 11

Nichols v. United States, 511 U.S. 738 (1994) 16, 17

Pope v. *Illinois*, 481 U.S. 497 (1987) 6, 10

Rose v. *Clark*, 478 U.S. 570 (1986) 3, 4, 6, 9

Sims v. Georgia, 385 U.S. 538 (1967) 15

Staples v. *United States*,
511 U.S. 600 (1994) 4, 7

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

United States v. *Gaudin*, 515 U.S. 506 (1995) . . . . *passim*

United States v. Hyde, 117 S. Ct. 1630 (1997) 14

Vasquez v. Hillery, 474 U.S. 254 (1986) 9

Waller v. Georgia, 467 U.S. 39 (1984) 9

Yates v. *Evatt*, 500 U.S. 391 (1991) 6, 10

TABLE OF AUTHORITIES — Continued

Page

Statutes and Rules

Fed. R. Crim. P. 11 14

Miscellaneous

W. Blackstone, *Commentaries on the Laws of England* (Cooley ed. 1899) 19

M.H. Graham, *Handbook of Federal Evidence* (3d ed. 1991) 13

McCormick, *Evidence* (4th ed. 1992) 13, 14

Wigmore, *Evidence* (Chadbourn rev. 1972) 13, 14

Wigmore, *Evidence* (Chadbourn rev. 1981) 13, 14

The government does not and cannot reconcile the Eleventh Circuit's decision with *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) — in particular, *Sullivan*'s holding that "the entire premise of *Chapman* review is simply absent" in the case of an incomplete jury verdict because "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Id.* at 280 (emphasis in original). The government's failure to do so is hardly surprising, for *Sullivan* unequivocally forecloses any application of the harmless-error doctrine to this case. Unable to challenge the bedrock constitutional rule that appellate courts may not supply findings of guilt on elements never found by the jury, the government proposes to carve out a far-fetched and unprincipled exception to that rule.

Echoing the reasoning of the court of appeals, the government argues that the trial court's erroneous omission of *mens rea* from the jury's instructions is subject to harmless-error review because "it remove[d] *only one* element from the jury's consideration." U.S. Br. 18 (emphasis added). As explained in petitioner's opening brief, however, it is constitutionally meaningless how many elements were omitted from the jury's consideration. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all* the elements of the crime with which he is charged" *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995) (emphasis added). If, as the government claims, it is constitutionally permissible to affirm a conviction where the jury has not found one of the essential elements of the crime, why would that not also be true if two or three elements were omitted? Although this very question is posed in petitioner's opening brief (at 45), the government offers no answer.

The government also argues that this particular case is special because petitioner made testimonial admissions concerning the omitted element, and that admissions are

somehow *sui generis* and can therefore substitute for a jury's missing findings. Testimonial admissions by a defendant, however, are no different than any other form of evidence. Unlike a guilty plea, an admission is not self-defining. For this reason, courts and commentators have recognized for more than a century that the character and weight of an admission is for the jury to evaluate in the context of all of the evidence, including the circumstances surrounding the admission itself. For a reviewing court to declare harmless the omission of an essential element on the basis of a testimonial admission thus would be the same as declaring the error harmless on the ground that the evidence concerning the omitted element was "overwhelming" — a result plainly forbidden by *Sullivan*.

Unable to explain how the Constitution allows a conviction to stand where the jury has not found every element of a crime beyond a reasonable doubt, the government is compelled to skip ahead and defend the court of appeals' decision based on the weight of the evidence. According to the government, any error that is "harmless" based on the evidence of guilt must, *ipso facto*, be amenable to harmless-error review because "[r]eversal in those circumstances would vindicate no cognizable individual right and no valid societal purpose." U.S. Br. 14.

Whether a particular error is amenable to harmless-error scrutiny, however, has nothing at all to do with the nature or strength of the *evidence*. It depends entirely on the nature of the *error*. Thus, a structural error is "not curable by overwhelming record evidence of guilt." *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring) (citing *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408-09 (1947)). In this case, a straightforward application of this Court's harmless-error decisions compels the conclusion that the trial court's instructional omission "unquestionably qualifies as 'structural error,'" for all an appellate court can do when faced

with such an error is to offer its own "view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281-282 (quoting *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)).

In this case, it is undisputed that the trial court removed the essential element of *mens rea* from the jury's consideration, and that none of the jury's findings on other elements embraced the omitted element. Under *Sullivan*, the harmless-error doctrine cannot apply to such an "admittedly inchoate adjudication of guilt," nor can it be used by a court to supply factual findings of guilt that the jury never made. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., joined by Ginsburg, J., concurring).

I. FAILING TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT CANNOT BE "HARMLESS" WHERE IT RESULTS IN AN INCOMPLETE JURY VERDICT.

The government entirely fails to come to grips with this Court's decisions limiting the harmless-error doctrine to cases in which a jury entered a complete verdict, and forbidding its use to supply findings on elements that the jury never considered. See Pet. Br. 14-33.[1] Indeed, the government cannot reconcile the court of appeals' decision with either of these constitutional limitations on the harmless-error doctrine. Instead, the government unabashedly urges this Court to declare

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[1] Unable to rebut the argument that omission of an essential element is a "structural error," the government wrongly suggests that "petitioner's claim is not that a *Staples* error is 'structural' and immune from [harmless-error] review, but that the court of appeals used an improper method of harmless-error analysis in finding this particular error harmless." U.S. Br. 13. As petitioner's brief makes quite clear, it is indeed petitioner's contention that the omission of an essential element is a structural error. See Pet. Br. 22-26.

that it is constitutionally permissible to uphold the conviction of a person even if the jury has not found all of the elements of the crime beyond a reasonable doubt, so long as "*only one* element of the offense is omitted." U.S. Br. 23 (emphasis added). Alternatively, the government insists that harmless-error review is permissible because the evidence concerning the omitted element purportedly was "overwhelmingly established and essentially undisputed." *Id.* at 24. As we demonstrate below, these contentions patently misapply the harmless-error doctrine and ignore the constitutional limits on its use.

A. The Government's Arbitrary "One Element" Exception Is Contrary To This Court's Harmless-Error Decisions.

The government does not deny that the trial court's omission of the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994), removed from the jury's consideration an essential element of the offenses charged and resulted in a constitutionally incomplete verdict. See *Gaudin*, 515 U.S. at 512. The government also does not deny that the trial court's removal of the *Staples* element was the equivalent of a directed verdict on that element, and that a directed verdict cannot constitutionally be harmless. See Pet. Br. 17-19.[2] And,

[2] The government (Br. 32) cites Justice Blackmun's statement in his *Connecticut v. Johnson* plurality opinion that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue." 460 U.S. at 84-85. Perhaps the government means to suggest that this Court's subsequent decision in *Rose* v. *Clark*, which held that conclusive presumptions are subject to harmless-error review, somehow sanctioned the application of harmless-error review to directed verdicts. In fact, *Rose* held that a conclusive presumption was subject to harmless-error review precisely because it was *not* equivalent to a directed verdict. As the Court explained, quoting Justice Powell's dissenting opinion in *Johnson*, "[b]ecause a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (citation omitted). *Rose* also expressly stated that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." *Id.* at 578.

while downplaying their significance as stray "language in some * * * recent * * * decisions," it also acknowledges this Court's unequivocal warnings that an appellate court may not invoke harmless-error review to supply findings on element that were not found by the jury. U.S. Br. 24-25 & n.10 (citing, *e.g.*, *Sullivan*, 508 U.S. at 280). See also *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring).

To preserve petitioner's conviction, then, the government takes the only course it can: asking the Court to transform the harmless-error doctrine by holding that it is permissible to uphold a conviction rendered on an incomplete guilty verdict as long as the jury instructions "correctly set forth all of the elements of an offense *but one*" and "removed *only one* element from the jury's consideration." U.S. Br. 13, 18 (emphasis added).[3] The government's "one element" theory suffers from two fatal flaws. First, it is contrary to the constitutional foundations of the harmless-error doctrine as articulated by this Court. Second, even if it were not foreclosed by precedent, the government's theory makes no sense.

The government simplistically reasons that because this Court has held that certain instructional errors involving single elements "can be harmless in at least some cases" (U.S. Br. 17), the complete omission of a single element *also* must be amenable to harmless-error review. The government's analysis,

[3] See also U.S. Br. at 23 (rule established in *Sullivan* should not apply where "only one element of the offense is omitted"); *id.* at 24 (contending that it is appropriate to apply harmless-error analysis to "a single-element instructional omission"); *id.* at 37 n.17 (attempting to distinguish "single-element instructional error" from error affecting all elements).

however, entirely ignores *why* the Court found those particular single-element errors to be subject to harmless-error review. It is true that in each of the cases the government cites — *Yates* v. *Evatt*, 500 U.S. 391 (1991); *Rose* v. *Clark*, 478 U.S. 570 (1986); *Carella* v. *California*, 491 U.S. 263 (1989); and *Pope* v. *Illinois*, 481 U.S. 497 (1987) — the Court found that an instructional error was susceptible to harmless-error scrutiny and the error in question involved only a single element of the offense. But the Court's holdings in these cases had nothing to do with the *number* of elements at issue. Rather, it was the *nature* of the instructional error that allowed for harmless-error review. As this Court explained in *Sullivan*, 508 U.S. at 280-281, each of the cases cited by the government involved circumstances where a complete verdict was entered by the jury on *all* of the elements, and where the appellate court could declare the instructional error harmless *based on what the jury actually found*. See Pet. Br. 27-33.[4]

Apart from the absence of any support in this Court's precedents, the government's "one element" exception is wholly unprincipled. If the omission of a single element is susceptible to harmless-error review, why not two elements, or even three? Notably, the government never answers this question, which was squarely posed by petitioner. Pet. Br. 45. That is because there is no answer. A constitutionally incomplete verdict is a constitutionally incomplete verdict, regardless of whether it

[4] The government tries to distinguish *Sullivan* on the ground that "*Sullivan* did not involve the distinct type of error at issue here: an instructional omission (or misdescription) of a single element of an offense." U.S. Br. 22. This distinction, however, only supports petitioner. As Chief Justice Rehnquist noted in *Sullivan*, one could debate whether the error in *Sullivan* was structural because it did not "remove[] an element of the offense from the jury's consideration or prevent[] the jury from considering certain evidence." 508 U.S. at 283-284 (concurring opinion). Here the trial court's error *did* entirely remove an element from the jury's consideration.

arises from the omission of one, two or three elements. *Gaudin* itself was a "one element" case. So was *Carpenters*. Yet nowhere did the Court suggest that the constitutional error in either case was somehow mitigated by the fact that it concerned "only one element."[5] To the contrary, this Court reaffirmed the Constitution's requirement that a guilty verdict "rest upon a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510 (emphasis added).

The government's "one element" exception also makes no practical sense, as its own brief confirms. For instance, the government appears to believe that its proposed exception would apply only where the trial court omits an *important* element of the crime charged — a course implicit in its argument that the jury instructions below merely omitted the "*limited* scienter element" required by *Staples*. U.S. Br. 38 (emphasis added). One might also question whether the government's attempt to trivialize this scienter element accurately reflects the Court's opinion in *Staples*. See *Staples*, 511 U.S. at 615-619. But in any event, the essential point is that *any* effort to distinguish an "outcome-determinative" element (U.S. Br. 25 n.10) from "a relatively straightforward and technical element of an offense" (*id.* at 23) is untenable.

[5] Even the government is unwilling to take its own position to its logical conclusion. The government concedes that "[i]f a defendant were to admit *every* element of his offense at trial and then, in outright disregard of established legal rules, the district court were to enter a judgment of conviction without submitting the case to the jury at all, reversal would be warranted." U.S. Br. 37 (emphasis added). Thus, according to the government, it would be constitutionally permissible to convict a person if *one* element of the crime is omitted, but not if *all* of the elements are omitted. Why this is so, the government does not say.

"A jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime" *Roy*, 117 S. Ct. at 338 (Scalia, J., joined by Ginsburg, J., concurring). If the jury has not found every element beyond a reasonable doubt, "there [is] no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280 (emphasis in original).

B. The Applicability Of The Harmless-Error Doctrine To A Particular Error Depends Upon The Nature of The Error, Not The Strength Of The Evidence.

The government's brief ultimately abandons its effort to reconcile the court of appeals' decision with this Court's harmless-error decisions, focusing most of its effort to urging this Court to permit the use of harmless-error review because the evidence concerning the omitted *mens rea* element was "overwhelming." U.S. Br. 20-22. In short, the government would have the Court simply overlook the step of determining whether the error below is subject to harmless-error analysis, and declare that any error which is "harmless" based on the evidence must, *ipso facto*, be amenable to harmless error scrutiny. The government's argument is futile, because, as *Sullivan* makes clear, the applicability of harmless-error review has nothing do with the nature or strength of the evidence.

As the government concedes, the first question in any harmless-error case is whether the error is "amenable to harmless-error review at all." U.S. Br. 15. See also *Chapman*, 386 U.S. at 20; Pet. Br. 14. Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether, in light of the evidence adduced at trial, the error actually was harmless. *Sullivan*, 508 U.S. at 280. Whether an error is of the "structural" sort that "def[ies] analysis by 'harmless-error' standards," (*Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)), has nothing to do with the

evidence. A "structural" error, by definition, "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. For example, when a jury is constituted in a racially discriminatory fashion (see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986)), or a defendant is denied a public trial (see *Waller* v. *Georgia*, 467 U.S. 39 (1984)), it makes no difference that the evidence of guilt may be viewed by an appellate court as overwhelming. Such errors are structural, and hence not susceptible to harmless-error review, "no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277.

Where, as here, there is an "admittedly inchoate, adjudication of guilt" (Pet. App. 12a n.12) because the jury has not found the defendant guilty of every element of the offense charged, the error is "structural," and thus immune from harmless-error scrutiny, because there is nothing an appellate court can do to alter the fact that "the wrong entity judge[d] the defendant guilty." *Sullivan*, 508 U.S. at 281. No amount of evidence can show the jury found what it never considered — or, in this case, was instructed *not* to find.

Thus, the government's self-serving (and incorrect) assertion that the trial court's instructional omission "would not have affected a rational jury's determination that petitioner was guilty" (U.S. Br. 14-15) is beside the point. "The absence of a formal verdict on [an element] cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring). "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty- beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless."

Sullivan, 508 U.S. at 280.[6] Here, it is undisputed that the trial court removed the element of *mens rea* from the jury's consideration, and that thus there was no verdict within the meaning of the Constitution. As such, the most an appellate court would be able to do is speculate about what a reasonable jury would have decided had it considered the omitted element. "That is not enough." *Sullivan*, 508 U.S. at 280.

II. OMISSION OF AN ESSENTIAL ELEMENT IS IMMUNE FROM HARMLESS-ERROR REVIEW EVEN IF THE DEFENDANT "ADMITS" THE OMITTED ELEMENT.

Undaunted by the absence of a complete jury verdict, the government insists that the error in this case is harmless because of "the special status of sworn admissions by a defendant at trial." U.S. Br. 28. Relying upon the Court's decision in *Motes* v. *United States*, 178 U.S. 458, 476 (1900), the government posits a distinction "between evidence introduced against a defendant by the prosecution and testimonial admissions made by a defendant on the witness

[6] The government acknowledges that "language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on 'overwhelming evidence' to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error." U.S. Br. 24 (citing *Sullivan*, 508 U.S. at 280; *Yates*, 500 U.S. at 404; *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring)). It argues, however, that "other decisions have acknowledged that, at least in some contexts, a reviewing court may take into account what the jury necessarily would have found if improperly excluded evidence had been admitted or if incorrect instructions had been correct." U.S. Br. 25-26 (citing, *e.g.*, *Pope*, 481 U.S. at 503 & n.6; *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986)). What the government ignores, however, is that *each* of the cases it cites was decided in the "context" of a complete jury verdict, where the reviewing court's role was limited to determining whether the jury's actual and *complete* verdict would have been different; not speculating what a jury would have found on an element it never considered. See Pet. Br. 27-33.

stand." U.S. Br. 27. While it apparently concedes that the former are "'simply pieces of evidence'" that the jury may accept or reject in reaching its verdict, the government argues that the latter may be used by an appellate court as a substitute for jury findings because "'[i]t would be trifling with the administration of the criminal law'" to require a jury to find what a defendant seemingly has admitted by his own testimony. *Id.* at 28-29. Whatever its superficial appeal, the government's analysis cannot withstand scrutiny.

A. The case on which the government relies, *Motes* v. *United States*, 178 U.S. 458 (1900), involved an evidentiary error, not an instructional omission. It therefore has no bearing on the question presented here. *Motes* was unremarkable when it was decided, and remains so today under modern harmless-error standards, since it is well established that the wrongful exclusion or admission of evidence is properly subject to harmless-error review in cases where a complete verdict is entered by the jury. See, *e.g.*, *Fulminante*, 499 U.S. at 310.

There was no instructional error discussed or implied in *Motes*, and certainly nothing in the Court's decision even remotely suggests that a defendant's testimonial admissions can serve as a substitute for jury findings on an omitted element. Rather, the Court set aside the convictions of all but one of the defendants because their rights under the Confrontation Clause were infringed by the admission of a statement by an alleged co-conspirator who implicated the other defendants in the crime, but who was unavailable at trial because he had escaped government custody. 178 U.S. at 471. The Court found, however, that the remaining defendant's in-court admission of guilt constituted "enough * * * to require a verdict of guilty as to him, even if the jury had disregarded" the erroneously admitted statements. *Id.* at 475. As the Court briefly noted, "[t]he admission of the statement of [the co-conspirator] was * * * of no consequence" to the jury given the defendant's own

confession on the witness stand. *Ibid.* Viewed in *Chapman* terms, *Motes* simply held "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. It thus reflects a straightforward example of harmless-error review in a setting where an admission may indeed be significant. *Cf. Carella*, 491 U.S. at 270 (Scalia, J., concurring). In short, *Motes* cannot bear the weight the government places on it. And that *Motes* is the only authority the government can muster speaks volumes to the poverty of its position.[7]

B. The government's claim that testimonial admissions may constitutionally be used by a reviewing court to "fill in the gaps" of an incomplete jury verdict also is fatally flawed because it ascribes a talismanic significance to admissions that they simply do not have. To begin with, it is uncontested that a defendant's admissions in no way relieve the government's burden of proof. See *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991). More importantly, unlike guilty pleas, admissions from

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[7] The government points to the plurality's statement in *Connecticut* v. *Johnson* that a "*Sandstrom* error may be harmless if the defendant conceded the issue of intent" (460 U.S. at 87), and then challenges petitioner to "explain why an admission as to intent would render *Sandstrom* error harmless," but not the omission of an element. U.S. Br. 32. In fact, as explained in petitioner's opening brief (at 30 n.9), the reason why an admission can render a *Sandstrom* error harmless is apparent from *Johnson* itself, *i.e.*, because an admission may in some cases "sufficiently reduc[e] the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless." 460 U.S. at 87. As Justice Scalia later explained in *Carella*, an admission can render the use of a conclusive presumption harmless precisely because it represents one of the "'rare situations' when 'the reviewing court can be confident that [such an] error did not play any role in the jury's verdict." 491 U.S. at 270 (concurring opinion) (quoting *Johnson*). The same cannot be said of an instructional omission because the jury did not make any finding whatsoever on the element in question.

the witness stand are not self-defining. They are made in the context of the record evidence as a whole, and their weight can only reliably be assessed by the jury in light of all of the circumstances in which they were made.

Like a confession, a testimonial admission could be crucially significant, or have little or no probative value, depending on the circumstances. See, *e.g.*, 2 McCormick, *Evidence* § 258, at 153-155 (4th ed. 1992); 4 Wigmore, *Evidence* §§ 1058-1059, at 26-27 (Chadbourn rev. 1972); M.H. Graham, *Handbook of Federal Evidence* § 801.26, at 812-814 (3d ed. 1991). Thus, "[w]hen a party testifying at trial * * * admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission," not as a conclusive judicial admission. *Keller v. United States*, 58 F.3d 1194, 1197 n.8 (7th Cir. 1995) (citing Graham § 6726, at 536-537). Dean Wigmore likewise urged the courts to resist the "temptation to accept [the] principle" that "a party's testimony on the stand as a witness may sometimes amount to a judicial admission." 9 Wigmore, *Evidence* § 2594a, at 834 & 844 (Chadbourn rev. 1981). As Wigmore explained, because testimonial admissions are made during the heat of trial and in the context of a conversational exchange, their meaning and weight cannot be determined in the same fashion as a formal stipulation or judicial admission:

> Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory stirring between all concerned. * * * The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself.

Id. at 844. McCormick echoed this sentiment, stressing that a "party's testimony, uttered by a layman in the stress of examination, cannot with justice be given the conclusiveness of the traditional judicial admission in a pleading or stipulation." McCormick, *supra*, at 155.

A "true" admission, as Wigmore explained, "is a *formal* act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true." 4 Wigmore, *Evidence* § 1058, at 26-27 (emphasis added). It is "conclusive, in the sense that it formally waives all right to deny, for the purposes of the trial, *i.e.*, it removes the proposition in question from the field of disputed issues." *Ibid.* By contrast, a "quasi" admission is simply "an item in the mass of evidence," *id.*, § 1058, at 26, and is "*not in any sense final or conclusive.*" *Id.* at 27 (emphasis in original). See also 9 Wigmore, § 2588, at 821 (noting that a "judicial admission is sharply marked off from the ordinary or quasi-admission * * * [which] is merely an item of evidence").[8]

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[8] Although, as the government points out (U.S. Br. 33 n.16), Wigmore's discussion focuses largely on civil proceedings, the government offers no rationale for treating admissions at a criminal trial any differently than those in a civil trial. If anything, admissions in a criminal case should be accorded *less* conclusive weight because they are made without the "care and discernment" of a formal guilty plea. *United States* v. *Hyde*, 117 S. Ct. 1630, 1634 (1997). As this Court observed in *Hyde*, Rule 11 sets forth several "prerequisites to accepting a guilty plea," including that the trial court "ensure the defendant understands the maximum possible penalty that he may face by pleading guilty * * * and the important constitutional rights he is waiving, including the right to a trial." *Id.* at 1633 (quoting Fed. R. Crim. P. 11(c)). *Cf. Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive"). Even a confession — which, after all, is "one species of admission, namely, an admission consisting of an assertion, by the accused

Determining whether the testimony that comprises an "admission" establishes any particular element of a crime beyond a reasonable doubt, particularly an inherently subjective element such as intent or knowledge, necessarily requires an appreciation of the subtle details and nuances of the trial — facets far better observed from the jury box than the appellate bench. Indeed, depending upon the circumstances, the weight of an admission may range from that of conclusive effect to that of marginal significance — a determination surely committed to the jury's judgment. As perhaps best explained by the New York Court of Appeals more than 75 years ago:

> [T]he jury in determining their effect, or probative value or weight, must apply to [admissions] the rule of reason. The effect they have, in reason and sound judgment, upon the mind of the jury, in view of their language, character, the time when and person to whom they were made, the circumstances and conditions attending their making, and the other facts in evidence, is the effect they should have upon the claim of the party. In case they were made in ignorance of the facts or in an abnormal state of mind, or were based in part upon mere opinion, or were made casually or thoughtlessly or insincerely, or under like or analogous conditions or circumstances, they may, in reason, deserve slight consideration or value or none at all. In case they were made understandingly and deliberately, are of

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in a criminal case" (4 Wigmore, § 1050, at 11) — is treated as a testimonial or quasi-admission, not a judicial admission. The trial court thus must "allow[] the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant." *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967). See also *United States* v. *Hall*, 93 F.3d 1337, 1344 (7th Cir. 1996) (it remains "within the jury's province to assess the truthfulness and accuracy of the confession").

> pure fact within the knowledge of the declarant, and were made under conditions and circumstances conducive to veracity, and are not overborne by the other facts in evidence, they may, in reason and sound judgment, establish a cause of action or defense.

Gangi v. *Fradus*, 227 N.Y. 452, 456-457, 125 N.E. 677, 679 (1920). As the New York Court went on to explain, the placement of any testimonial admission along this continuum is exclusively the function of the jury, not the court:

> Whether [admissions] are of the one class or the other, or intermediate, is for the determination of the jury. The effect they shall have upon the issues being tried is for their determination. The trial justice may not instruct as to the rank assignable to them or the influence to be yielded by them. The jury may accept a part as true and put aside a part as not true. In those respects the law has no gauge. *Ibid.*

In short, admissions plainly are capable of more than one interpretation or meaning. Admissions, unlike guilty pleas or stipulations, are simply pieces of evidence whose significance can only be determined by the trier of fact from a complete knowledge and understanding of the trial itself. It is for this reason that the government's argument fails. A reviewing court can declare harmless the omission of an essential element on the basis of testimonial admissions only by weighing the evidence itself and making its own factual findings on the omitted element. As this Court clearly has warned, however, "[f]indings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986).

C. The government also offers no explanation as to how "admissions" practically could serve as a basis for invoking harmless error review. Indeed, the rule it urges would be "an illogical and unworkable deviation from [the Court's] previous cases" (*Nichols* v. *United States*, 511 U.S. 738, 757 (1994)), creating more questions than it answers, and giving the courts of appeals no predictable means of determining whether they can even engage in harmless-error review in the first place.

Since testimonial admissions are not self-defining, and their significance cannot be measured without actually weighing all of the record evidence, a reviewing court asked to find the omission of an essential element harmless based on testimonial admissions would be confronted with a host of fact-based questions, none of which it can constitutionally answer. What precisely is it that the defendant admitted? What were the circumstances in which the defendant made the admission? What did the defendant intend by the admission? What weight should it have? Is there other evidence bearing on its weight? Does the admission establish the omitted element beyond a reasonable doubt?

Even if all of these questions could be answered, and the appellate court is convinced that the defendant's admissions establish the omitted element, the inquiry cannot end there, since the omitted element "may not be judged in artificial isolation." *Estelle*, 502 U.S. at 72. See also J.A. 100 ("you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law") (actual jury charge below). The government assumes throughout its brief that when an element is omitted, the appellate court need only look to the evidence bearing on the omitted element, taking all of the other elements found by the jury as a given. Yet, the omission of an essential element often will impact the jury's consideration of other elements since such an omission requires the jury to consider the remaining

elements of the crime charged out of their actual and proper context, and without a full appreciation of *all* of the elements that constitute the charged offense. See *Boyde* v. *California*, 494 U.S. 370, 379-381 (1990).

In this case, for example, the question of whether petitioner knowingly possessed the silencer in question was a hotly contested issue based entirely on circumstantial evidence. See Pet. Br. 46-47. Petitioner testified that he did not, and never would have, knowingly possessed a silencer because of his experiences in the Vietnam War. *Id.* at 38. It is also undisputed, as explained in petitioner's opening Brief (at 46), that by telling the jury that the government was not required to prove that the defendant knowingly possessed a firearm within the meaning of the law, the jury easily could have believed that possession of an unregistered or unserialized silencer was a strict liability offense. More importantly, without the *Staples* element, the jury, which already had "trouble with its deliberations" (J.A. 109), was forced to assess petitioner's guilt or innocence without considering his central defense that he never would have possessed a silencer *because of* his knowledge or experience with silencers, and without an appreciation of the moral culpability required to establish the offenses charged.[9]

In short, an appellate court asked to declare harmless the omission of an essential element based on testimonial admissions can only do precisely that which the court of appeals did below, *i.e.*, weigh the record evidence and fill in the gaps to cobble together a verdict based on nothing more than its

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[9] The government gratuitously suggests (U.S. Br. 31-32, 34) that what petitioner seeks through a new trial is the opportunity to convince a jury to disbelieve his testimony. Petitioner seeks no such thing. To the contrary, the admissions prominently cited by the government, including petitioner's experience with silencers during the War and his ability to identify silencers, was an essential part of petitioner's defense at trial.

"certainty" that "the verdict * * * would have been the same absent the defective instruction." Pet. App. 17a. Right or wrong, such a finding is "a finding of fact by judges, not by a jury." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). And as *Sullivan* holds, "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." 508 U.S. at 279.

III. OMISSION OF AN ESSENTIAL ELEMENT CANNOT BE SUBJECT TO HARMLESS-ERROR REVIEW IF THE RIGHT TO TRIAL BY JURY IS TO BE PRESERVED.

The government oddly argues that granting a new trial to a person who was convicted of a crime, but who was not found guilty by the jury of every element of the offense charged, "would vindicate no cognizable individual right and no valid societal purpose." U.S. Br. 14. *Nothing* could be further from the truth. Indeed, to hold that removal of an essential element from the jury's purview cannot be harmless is to affirm every individual's constitutional "right to have the jury, rather than the judge, reach the requisite finding of 'guilty'" (*Sullivan*, 508 U.S. at 277) — a guarantee that itself is the "most important element" of the right to a jury trial. *Ibid.* Such a holding also would serve as a clear statement that the jury trial right will be enforced regardless of how appellate courts view the evidence, and would provide the reassurance that one can be found guilty of a crime only "by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'" *Duncan* v. *Louisiana*, 391 U.S. 145, 151-52 (1968) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899)).

Requiring, as a condition of harmless-error scrutiny, that a jury be instructed on every essential element of the crime charged also would preserve the jury's ability to reliably

discharge its function as the arbiter of guilt or innocence by ensuring that every juror will fully appreciate all of the elements that constitute the offense, and assess each element in its proper context. As explained in petitioner's brief (at 45), to grant appellate courts the power to declare harmless the omission of even a single element would grant courts the open license to serve as triers of fact on issues never considered by the jury in the first place. The government does not deny this.

In short, the omission of an element from the jury's instructions, and the resultant failure of the jury to enter a complete verdict concerning the offense charged, must surely be included among the structural errors that defy harmless-error scrutiny. *Sullivan*, 508 U.S. at 281. To hold otherwise "would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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No. 96-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

SPP

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MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioner George G. Rogers hereby respectfully moves this Honorable Court, pursuant to Supreme Court Rule 25.6, for leave to file the attached 3-page Supplemental Brief. In support of his Motion, Petitioner states as follows:

1. At oral argument, various Justices inquired as to whether the question presented is properly before the Court in this case. In particular, Justices questioned whether the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994) was, as presumed by the question presented, omitted by the trial court from the jury's instructions.

2. In order to address these concerns, and because this issue was not specifically addressed by the parties in their briefs, petitioner respectfully asks that he be granted leave to file a short 3-page Supplemental Brief which articulates the

various reasons why the question presented is indeed properly subject to the Court's review in this case.

WHEREFORE, for the reasons set forth above, petitioner George G. Rogers respectfully requests that this Court grant him leave to file the attached 3-page Supplemental Brief.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

NOVEMBER 1997

SUPPLEMENTAL BRIEF FOR PETITIONER

At oral argument, various Justices inquired as to whether the question presented is properly before the Court in this case. In particular, Justices questioned whether the *mens rea* element required by *Staples* v. *United States*, 511 U.S. 600 (1994) was, as presumed by the question presented, omitted by the trial court from the jury's instructions. As we briefly explain below, the question presented is indeed properly the subject of this Court's review in this case.

First and foremost, the question presented *precisely* tracks the decision of the court of appeals: the Eleventh Circuit held that "[w]ith the benefit of the Supreme Court's opinion in *Staples*, we can now indubitably state that the district court's action effectively omitted from the instructions an essential element of the crime charged under § 5861(d)," and that the error nevertheless was subject to harmless-error review because "the instructional omission related to an element of the crime that defendant in any case admitted." Pet. App. 8a, 16a. This alone confirms that the question presented is squarely presented for the Court's review, since it is the central question that was "passed upon" by the court of appeals. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Accord *United States* v. *Williams*, 504 U.S. 36, 41-42 & n.2 (1992); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

Second, the premise of the question presented — *i.e.*, that the *Staples* element was omitted from the jury's instructions — is also supported by the government's repeated concessions both in the court of appeals and in this Court, that the *Staples* element was "explicitly withdrawn" from the jury's consideration. In fact, the question presented actually was *framed* by the government in its opposition to certiorari. In the court of appeals, the government also conceded that the *Staples* element was withdrawn and that the trial court's charge did "not pass post-*Staples* muster insofar as it explicitly withdrew from the jury's consideration the issue of appellant's knowledge

that the 'firearm' he possessed fell within the statutory definition." U.S. C.A. Br. 10. In this Court, the government likewise has conceded (both in opposition to certiorari, in its merits brief, and again at oral argument) that "[t]he court did not clearly instruct the jury that, to convict, it had to find that petitioner specifically knew that the item in his possession was a silencer or that it had characteristics that subject it to regulation under Section 5845." U.S. Br. in Opp. 2-3. See also U.S. Br. 7-8, 12-13. These candid concessions not only confirm that the jury reasonably could have understood the trial court's instructions as removing the *Staples* element from its consideration, but that this issue need not even be considered by this Court since the government has explicitly waived any argument that the element was not omitted by the trial court. See, *e.g.*, Sup. Ct. R. 15.2.

Third, a careful review of the jury instructions themselves reveals that the trial court *did*, as the court of appeals held, omit the *Staples* element from the jury's consideration. In *Staples*, this Court held that to convict a defendant of possession of unregistered "firearms" the government must prove that the defendant knew "the particular characteristics that make his weapon a statutory firearm." 511 U.S. at 609. The trial court removed that element from the jury's consideration by charging that "[i]t is not necessary for the Government to prove that Defendant knew that the item described in the indictment was a 'firearm' which the law requires to be registered." J.A. 104. The trial court reiterated its removal of this element in its summary of the government's burden of proof, which makes no reference at all to the *Staples* element: "What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a 'firearm' as defined above, and that i[t] was not then registered to the Defendant in the National Firearms Registration and Transfer Record." *Ibid.*

Finally, even if the court's instructions are viewed as ambiguous, the instructional error nonetheless would remain because, as the court of appeals' decision and the government's concessions confirm, there is certainly a "reasonable likelihood" that the jury below interpreted the instructions as removing the *Staples* element — which is all that is required by this Court's holding in *Boyde* v. *California*, 494 U.S. 370, 380 (1990).

In sum, the question presented in this case is properly presented for the Court's review, both because it precisely tracks the holding of the court of appeals, because it is amply supported by the record below, and because the government has waived any contention that the *Staples* element was not omitted by the trial court. Thus, as explained in the Petition, this case provides an ideal vehicle to resolve the pervasive confusion that exists at the state and federal levels over the question of whether and to what extent the omission of an element is subject to harmless-error scrutiny. See Pet. 11-17.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
ROBERT M. DOW, JR.
GARY S. FEINERMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

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